(3)

No. 91-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG,

Petitioners,

v.

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION

THOMAS R. KLINE
(Counsel of Record)
THOMAS E. STARNES
ANDREWS & KURTH L.L.P.
1701 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 662-2700

JOHN DAVID HOOVER
SALLY F. ZWEIG
JOHNSON, SMITH, DENSBORN, WRIGHT & HEATH
One Indiana Square,
Suite 1800
Indianapolis, Indiana 46204
(317) 634-9777

Attorneys for Respondents

EDITOR'S NOTE

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TABLE OF CONTENTS

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS,
Plaintiffs,
v.
GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG,
Defendants.

CAUSE NO. IP 89-304-C

MEMORANDUM ENTRY

This cause comes before the Court on the plaintiffs' Motion to Dismiss Damages Claim, to Vacate Stay, and for Sanctions, and the defendants' Motion to Dismiss for lack of personal and subject matter jurisdiction filed *pro per*.[1] On August 8, 1989, the Court, in an Agreed Order, entered a stay which prevented the movement of four Byzantine mosaics removed from the Church of Panagia Kanakaria in Northern Cyprus pending appellate review of the award of possession to the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus. *See Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989). The order of possession was affirmed on appeal. 917 F.2d 278 (7th Cir. 1990). The Seventh Circuit determined not to rehear the matter and the Supreme Court of the United States declined to extend the time for filing a petition for Writ of Certiorari.[2]

The plaintiffs now move to dismiss voluntarily the sole remaining claim in this action, their damages claim. Prior to

[1] Defendant Goldberg is proceeding *pro per*, a diminutive of *in propria persona*. *In propria persona* is defined as "[i]n one's own proper person." *Black's Law Dictionary* 792 (6th ed. 1990) (as contrasted with *pro se*).

[2] In addition, almost one year after the Court's 1989 judgment, the defendants filed a motion to set aside the judgment based on alleged newly discovered evidence. The Court denied the motion. Though defendants filed a notice of appeal, no brief was ever filed and the Court of Appeals dismissed the second appeal for failure to prosecute.

trial, the damages claim was severed from the issue of right of possession. Little effort has been expended on the damages issue. The plaintiffs assert, and the Court agrees, that dismissal of the damages claim will not prejudice the defendants. Accordingly, the Court concludes that the damages claim should be dismissed and the Agreed Order vacated. The Court concludes that the Autocephalous Greek-Orthodox Church of Cyprus has a superior and enforceable claim, as well as valid title, to the mosaics which are the subject of this lawsuit. The Church therefore has the right to immediate and unimpaired possession of the mosaics. The defendants, on the other hand, do not enjoy either the right to possess the mosaics or valid title to these unique religious, historical and cultural artifacts.

I. Personal Jurisdiction

The defendants assert that the Court should dismiss this action pursuant to Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure because the Court lacks personal and subject matter jurisdiction. The Court need not reach the merits of the issue because the defendants have waived their right to challenge the Court's *in personam* jurisdiction.

The defendants have waived their right to assert lack of personal jurisdiction because they have not raised this argument in a timely fashion. They did not raise it before or during trial, during the pendency of their appeal, or in their Application for Extension of Time to File Petition for Writ of Certiorari. It is well-settled that the defense of lack of personal jurisdiction "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co. v. Bethlehem Steel Shipbuilding Corp.*, 308 U.S. 165, 168, 60 S.Ct. 153, 155 (1939); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 663 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092, 107 S.Ct. 1303 (1987) ("normally a failure to timely raise the defense of personal jurisdiction waives the defense; Fed. R. Civ. P. 12(h)(1) is unequivocal on this point").[3]

[3] Policy reasons strongly militate against entertaining delayed motions to dismiss for lack of personal jurisdiction. Such motions are not favored both because they impair the efficient operation of the judicial system and because they "may create statute of limitations problems for plaintiffs whose original

(Footnote continued on next page)

II. Subject Matter Jurisdiction

In this action, subject matter jurisdiction is predicated on diversity of citizenship, 28 U.S.C. §.1332.[4] The diversity statute provided in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and is between—
>
> * * *
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> * * *
>
> (4) a foreign state, defined in sections 1603(a) of this title, as plaintiff and citizens of a State or of different states.

28 U.S.C. § 1332(a)(2), (4).[5] Defendant Peg L. Goldberg is an Indiana citizen. Defendant Goldberg & Feldman Fine Arts, Inc. is an Indiana corporation with its principal place of business in Carmel, Indiana. Plaintiff Autocephalous Greek-Orthodox Church of Cyprus, a religious organization with its principal offices in Nicosia, Cyprus, is a citizen or subject of a foreign state. Plaintiff Republic of Cyprus is a sovereign foreign state. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs. Accordingly, the requirements of the diversity statute are satisfied.

Defendant Goldberg argues incomprehensibly that (1) defendants are not citizens of a state under 28 U.S.C. § 1332; (2) the Republic of Cyprus is not a foreign state; and (3) the Church of Cyprus is not a citizen or subject of a foreign state. As the

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(Footnote continued from previous page)

actions are dismissed years after commencement in response to such motions." *Creech v. Roberts*, 908 F.2d 75, 85, n. 2 (6th Cir. 1990) (Opinion concurring in part and dissenting in part).

[4] As the Seventh Circuit noted, the version of 28 U.S.C. § 1332 in effect prior to the 1988 amendment applies in this case. 917 F.2d at 284 n. 6.

[5] "A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ." 28 U.S.C. § 1603(a).

defendants have (previously) acknowledged in their Answer, the Republic of Cyprus is clearly a foreign state. *Answer*, ¶ 2.

Further, the issue of subject matter jurisdiction has been resolved by the Seventh Circuit. The Seventh Circuit held that the evidence submitted at trial "sufficiently established that the Church is recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity, and thus is a 'citizen or subject' of that state" for the purposes of diversity jurisdiction. 917 F.2d at 285.

Under the doctrine of law of the case, this Court must follow the mandate of the Seventh Circuit. "When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court." *Insurance Group Comm. v. Denver & R.G.W. R.R.*, 329 U.S. 607, 612, 67 S.Ct. 583, 585 (1947); *see Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 493 (7th Cir.), *cert. denied*, 459 U.S. 943, 103 S.Ct. 257 (1982); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4478 (1981 & 1991 Supp.). "[T]he doctrine most often applies to issues already fully decided in cases that subsequently re-appear before the rendering court." *Trustees of Indiana Univ. v. Aetna Cas. & Sur. Co.*, 920 F.2d 429, 435 (7th Cir. 1990). The issue of subject matter jurisdiction was litigated and resolved by the Seventh Circuit. The same facts still apply in this case and the Court is bound to follow the Seventh Circuit's mandate. This Court has subject matter jurisdiction under any rational reading of the diversity statute.

III. Conclusion

For the foregoing reasons, the Court concludes that the plaintiffs' damages claim should be dismissed with prejudice. The defendants' motion to dismiss for lack of jurisdiction is denied in its entirety. Further, the stay of August 8, 1989 is vacated. The Autocephalous Greek-Orthodox Church of Cyprus has a superior and enforceable claim, as well as valid title, to the mosaics. The Church therefore has the right to their immediate and unimpaired possession.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-2809

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS,
Plaintiffs-Appellees,
v.
GOLDBERG AND FELDMAN FINE ARTS, INC. and PEG GOLDBERG,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 89-304-C

James E. Noland,
Senior District Judge.

ARGUED JANUARY 16, 1990—DECIDED OCTOBER 24, 1990

Before BAUER, *Chief Judge*, CUDAHY, *Circuit Judge*, and PELL, *Senior Circuit Judge*.

BAUER, *Chief Judge*.

> There is a temple in ruin stands,
> Fashion'd by long forgotten hands;
> Two or three columns, and many a stone,
> Marble and granite, with grass o'ergrown!
> Out upon Time! it will leave no more
> Of the things to come than the things before!
> Out upon Time! who for ever will leave
> But enough of the past and the future to grieve
> O'er that which hath been, and o'er that which must be:
> What we have seen, our sons shall see;
> Remnants of things that have pass'd away,
> Fragments of stone, rear'd by creatures of clay!
>
> from *The Siege of Corinth*,
> George Gordon (Lord Byron)[1]

[1] Reprinted in The Complete Poetical Works of Byron 384-96 (Cambridge Ed. 1933).

Byron, writing here of the Turkish invasion of Corinth in 1715, could as well have been describing the many churches and monuments that today lie in ruins on Cyprus, a small, war-torn island in the eastern corner of the Mediterranean Sea. In this appeal, we consider the fate of several tangible victims of Cyprus' turbulent history: specifically, four Byzantine mosaics created over 1400 years ago. The district court awarded possession of these extremely valuable mosaics to plaintiff-appellee, the Autocephalous Greek-Orthodox Church of Cyprus ("Church of Cyprus" or "Church"). *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp 1374 (S.D. Ind. 1989). Defendants-appellants, Peg Goldberg and Goldberg & Feldman Fine Arts, Inc. (collectively "Goldberg"), claim that in so doing, the court committed various reversible errors. We affirm.

I. BACKGROUND

In the early sixth century, A.D., a large mosaic was affixed to the apse of the Church of the Panagia Kanakaria ("Kanakaria Church") in the village of Lythrankomi, Cyprus. The mosaic, made of small bits of colored glass, depicted Jesus Christ as a young boy in the lap of his mother, the Virgin Mary, who was seated on a throne. Jesus and Mary were attended by two archangels and surrounded by a frieze depicting the twelve apostles. The mosaic was displayed in the Kanakaria Church for centuries, where it became, under the practices of Eastern Orthodox Christianity, sanctified as a holy relic. It survived both the vicissitudes of history, *see Autocephalous*, 717 F. Supp. at 1377 (discussing the period of Iconoclasm during which many religious artifacts were destroyed), and, thanks to restoration efforts, the ravages of time.[1]

Testimony before Judge Noland established that the Kanakaria mosaic was one of only a handful of such holy Byzantine relics to survive into the twentieth century. Sadly, however,

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[1] For more on the history, significance and restoration of the Kanakaria mosaic, see A. Megaw & E. Hawkins, The Church of the Panagia Kanakaria at Lythrankomi in Cyprus: Its Mosaics and Frescoes (1977).

war came to Cyprus in the 1970s, from which the mosaic could not be spared.

The Cypriot people have long been a divided people, approximately three-fourths being of Greek descent and Greek-Orthodox faith, the other quarter of Turkish descent and Muslim faith.[3] No sooner had Cyprus gained independence from British rule in 1960 than this bitter division surfaced. Civil disturbances erupted between Greek and Turkish Cypriots, necessitating the introduction of United Nations peacekeeping forces in 1964. (U.N. forces still remain in Cyprus.) Through the 1960s, the Greek Cypriots, concentrated in the southern part of the island, became increasingly estranged from the Turkish Cypriots, concentrated in the north.[4]

The tensions erupted again in 1974, this time with more violent results. In July, 1974, the civil government of the Republic of Cyprus was replaced by a government controlled by the Greek Cypriot military. In apparent response, on July 20, 1974, Turkey invaded Cyprus from the north. By late august, the Turkish military forces had advanced to occupy approximately the northern third of the island. The point at which the invading forces stopped is called the "Green Line." To this day, the heavily-guarded Green Line bisects Nicosia, the capital of the Republic, and splits the island from east to west.

The Turkish forces quickly established their own "government" north of the Green Line. In 1975, they formed what they called the "Turkish Federated State of Cyprus" ("TFSC"). In 1983, that administration was dissolved, and the "Turkish Republic of Northern Cyprus" ("TRNC") was formed. These "governments" were recognized immediately by Turkey, but all other nations in the world — including the United States—have never recognized them, and continue to recognize the Republic of

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[3] For For full treatment of the pre-independence history of Cyprus, see Hill, A History of Cyprus (4 vols.) (1949).

[4] This anxious period of Cypriot history is examined in T. Ehrlich, Cyprus, the "Warlike Isle": Origins and Elements of the Current Crisis, 18 Stan. L. Rev. 1021 (1966).

Cyprus ("Republic"), plaintiff-appellee in this action, as the only legitimate government for all Cypriot people.

The Turkish invasion led to the forced southern exodus of over one-hundred thousand Greek Cypriots who lived in northern Cyprus. Turkish Cypriots living in southern Cyprus (and tens of thousands of settlers from mainland Turkey) likewise flooded into northern Cyprus, resulting in a massive exchange of populations.

Lythrankomi is in the northern portion of Cyprus that came under Turkish rule. Although the village and the Kanakaria Church were untouched by the invading forces in 1974, the villagers of Greek ancestry were soon thereafter "enclaved" by the Turkish military. Despite the hostile environment, the pastor and priests of the Kanakaria Church continued for two years to conduct religious services for the Greek Cypriots who remained in Lythrankomi. Hardy as they must have been, these clerics, and virtually all remaining Greek Cypriots, were forced to flee to southern Cyprus in the summer of 1976. Church of Cyprus officials testified that they intend to re-establish the congregation at the Kanakaria Church as soon as Greek Cypriots are permitted to return safely to Lythrankomi. (Thirty-five thousand Turkish troops remain in northern Cyprus.)[1]

When the priests evacuated the Kanakaria Church in 1976, the mosaic was still intact. In the late 1970s, however, Church of Cyprus officials received increasing reports that Greek Cypriot churches and monuments in northern Cyprus were being attacked and vandalized, their contents stolen or destroyed. (Such reports were necessarily sketchy and unverifiable as officials from the Republic and Church of Cyprus have been denied access to northern Cyprus.) In November, 1979, a resident of northern Cyprus brought word to the Republic's Department of Antiquities that this fate had also befallen the Kanakaria Church and its mosaic. Vandals had plundered the church, removing anything of value from its interiors. The mosaic, or at least its most recognizable and valuable parts, had been forcibly ripped

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[1] A fascinating, first-hand account of current conditions in Cyprus appears in Weaver, Report from Cyprus, The New Yorker, Aug. 6, 1990, pp. 65-81.

from the apse of the church. Once a place of worship, the Kanakaria Church had been reduced to a stable for farm animals.

Upon learning of the looting of the Kanakaria Church and the loss of its mosaics (made plural by the vandals' axes), the Republic of Cyprus took immediate steps to recover them. As discussed in greater detail in Judge Noland's opinion, see 717 F. Supp. at 1380, these efforts took the form of contacting and seeking assistance from many organizations and individuals, including the United Nations Educational, Scientific and Cultural Organization ("UNESCO"); the International Council of Museums; the International Council of Museums and Sites; Europa Nostra (an organization devoted to the conservation of the architectural heritage of Europe); the Council of Europe; international auction houses such as Christie's and Sotheby's; Harvard University's Dumbarton Oaks Institute for Byzantine Studies; and the foremost museums, curators and Byzantine scholars throughout the world. The Republic's United States Embassy also routinely disseminated information about lost cultural properties to journalists, U.S. officials and scores of scholars, architects and collectors in this country, asking for assistance in recovering the mosaics. The overall strategy behind these efforts was to get word to the experts and scholars who would probably be involved in any ultimate sale of the mosaics. These individuals, it was hoped, would be the most likely (only?) actors in the chain of custody of stolen cultural properties who would be interested in helping the Republic and Church of Cyprus recover them.

The Republic's efforts have paid off. In recent years, the Republic has recovered and returned to the Church of Cyprus several stolen relics and antiquities. The Republic has even located frescoes and other works taken from the Kanakaria Church, including the four mosaics at issue here. These four mosaics, each measuring about two feet square, depict the figure of Jesus, the busts of one of the attending archangels, the apostle Matthew and the apostle James.

To understand how these pieces of the Kanakaria mosaic resurfaced, we must trace the actions of appellant Peg Goldberg

and the other principals through whose hands they passed in 1988.

Peg Goldberg is an art dealer and gallery operator. Goldberg ad Feldman Fine Arts, Inc., is the Indiana corporation that owns her gallery in Carmel, Indiana. In the summer of 1988, Peg Goldberg went to Europe to shop for works for her gallery. Although her main interest is 20th century paintings, etchings and sculptures, Goldberg was enticed while in The Netherlands by Robert Fitzgerald, another Indiana art dealer and "casual friend" of hers, to consider the purchase of "four early Christian mosaics." In that connection, Fitzgerald arranged a meeting in Amsterdam for July 1st. At that meeting, Fitzgerald introduced Goldberg to Michel van Rijn, a Dutch art dealer, and Donald Faulk, a California attorney. Van Rijn and Faulk were strangers to Goldberg. All she knew about them was what she learned in their few meetings, which included the fact that van Rijn, a published expert on Christian icons (she was given a copy of the book), had been convicted by a French court for art forgery; that he claimed to be a descendant of both Rembrandt and Rubins; and that Faulk was in Europe to represent Fitzgerald and van Rijn.

At that first meeting in Amsterdam on July 1, 1988, van Rijn showed Goldberg photographs of the four mosaics at issue in this case and told her that the seller wanted $3 million for them. Goldberg testified that she immediately "fell in love" with the mosaics. Van Rijn told her that the seller was a Turkish antiquities dealer who had "found" the mosaics in the rubble of an "extinct" church in northern Cyprus while working as an archaeologist "assigned (by Turkey) to northern Cyprus." (Goldberg knew of the Turkish invasion of Cyprus and of the subsequent division of the island.) As to the seller, Goldberg was also told that he had exported the mosaics to his home in Munich, Germany with the permission of the Turkish Cypriot government, and that he was now interested in selling the mosaics quickly because he had a "cash problem." Goldberg was not initially given the seller's identify. Goldberg also learned that Faulk, on behalf of Fitzgerald and van Rijn, had already met with this as-yet-unidentified seller to discuss the sale of these

mosaics. Her interest quite piqued, Goldberg asked Faulk to return to Munich and tell the seller—whose identity, she would eventually learn, was Aydin Dikman—that she was interested.

Faulk dutifully took this message to Dikman in Munich, and returned to Amsterdam the following day. Faulk returned from that meeting with a contract he signed as agent for van Rijn to purchase the mosaics from Dikman for $350,000. When Goldberg met with Faulk on July 2, she was not told of this contract, however. Faulk merely informed her that Dikman still had the mosaics (though he was "actively negotiating with another buyer"), and that, in Faulk's opinion the export documents he had been shown by Dikman were in order. Faulk apparently showed Goldberg copies of a few of these documents, none of which, of course, were genuine, and at least one of which was obviously unrelated to these mosaics. *See Autocephalous*, 717 F. Supp. at 1382.

The next day (all of this happening rather fast), the principals gathered again in Amsterdam. Goldberg, van Rijn, Fitzgerald and Faulk agreed to "acquire the mosaics for their purchase price of $1,080,000 (U.S.)" The parties agreed to split the profits from any resale of the mosaics as follows: Goldberg 50%; Fitzgerald 22.5%; van Rijn 22.5%; and Faulk 5%. A document to this effect was executed on July 4, 1988, which document included a provision reading, "This agreement shall be governed by and any action commenced will be pursuant to the laws of the state of Indiana."

In those hectic early days of July, Goldberg contacted Otto N. Frenzel III, a friend and high-ranking officer at the Merchants National Bank of Indianapolis ("Merchants"), and requested a loan from Merchants of $1.2 million for the purchase of the mosaics. She told Frenzel that she needed $1,080,000 to pay van Rijn and the others, and she required the additional $120,000 to pay for expenses, insurance, restoration and the like. Merchants assured her that financing could be arranged, if she could provide appraisals and other documents substantiating the transaction. With Fitzgerald's and van Rijn's help, Goldberg obtained the appraisals (all three of which valued the mosaics at between $3 and $6 million), and sent them to Merchants. That

done, she and Fitzgerald hurried to Geneva, Switzerland, for the transfer of the mosaics, which was to take place on July 5. After arriving in Switzerland, Goldberg learned that her requested loan had been approved by Merchants and the money would be forthcoming, though a few days behind schedule. Her financing secured, Goldberg proceeded to the July 5 meeting as scheduled. She could not yet turn over the money, but she wanted to get a look at what she was buying.

The July 5 meeting was held in the "free port" area of the Geneva airport, an area reserved for items that have not passed through Swiss customs. Faulk and Dikman arrived from Munich with the mosaics, which were stored in crates. Dikman introduced himself to Goldberg and then left; this brief exchange was the only time the two would meet. Goldberg then inspected the four mosaics. She testified that she "was in awe," and that, despite some concern about the mosaics' deteriorating condition, she wanted them "more than ever."

During the few days that Goldberg waited in Switzerland for the money to arrive from Merchants, she placed several telephone calls concerning the mosaics. She testified that she wanted to make sure the mosaics had not been reported stolen, and that no treaties would prevent her from bringing the mosaics into the United States. She called UNESCO's office in Geneva and inquired as to whether any treaties prevented "the removal of items from northern Cyprus in the mid- to late-1970s to Germany," but did not mention the mosaics. She claims also to have called, on advice from an art dealer friend of hers in New York, the International Foundation of Art Research ("IFAR"), an organization that collects information concerning stolen art. She testified that she asked IFAR whether it had any record of a claim to the mosaics, and that, when she called back later as instructed, IFAR told her it did not. Judge Noland clearly doubted the credibility of this testimony, noting, among other things, that neither Goldberg nor IFAR have any record of any such search. (A formal IFAR search involves a fee and thus generates a bill that would serve as proof that a search was performed.) *Autocephalous*, 717 F. Supp. at 1403. Judge

Noland also questioned Goldberg's testimony that she telephoned customers officials in the United States, Switzerland, Germany and Turkey. *Id.* The only things of which Judge Noland was sure was that Goldberg did not contact the Republic of Cyprus or the TRNC (from one of whose lands she knew the mosaics had come); the Church of Cyprus; "Interpol," a European information-sharing network for police forces; nor "a single disinterested expert on Byzantine art." *Id.* at 1403-04.

However Goldberg occupied her time from July 5 to July 7, on the latter date the money arrived. Goldberg took the $1.2 million, reduced to $100 bills and stuffed into two satchels, and met with Faulk and Fitzgerald at the Geneva airport. As arranged, Goldberg kept $120,000 in cash and gave the remaining $1,080,000 to Faulk and Fitzgerald in return for the mosaics. Faulk and Fitzgerald in turn split the money with van Rijn, Dikman and their other cohorts as follows: $350,000 to Dikman (as per Faulk and van Rijn's prior agreement with him); $282,500 to van Rijn, $297,500 to Fitzgerald; $80,000 to Faulk; and $70,000 to another attorney in London. Along with the mosaics, Goldberg received a "General bill of sale" issued by Dikman to Goldberg and Feldman Fine Arts, Inc. The following day, July 8, 1988, Goldberg returned to the United States with her prize.

Back home in Indiana, Goldberg took what she had left of her $120,000 cut and deposited in into several of her business and personal bank accounts. After paying for the insurance and shipment of the mosaics, as well as a few unrelated art purchases, that sum amounted to approximately $70,000. Her friends and business associates in Indiana soon took quite an interest in her purchase; literally. For large sums of money, Frenzel, Goldberg's well-placed friend at Merchants, and another Indiana resident named Dr. Stewart Bick acquired from van Rijn and Fitzgerald substantial interests in the profits from any resale of the mosaics.

Peg Goldberg's efforts soon turned to just that: the resale of these valuable mosaics. She worked up sales brochures about them, and contacted several other dealers to help her find a buyer. Two of these dealers' searches led them both to Dr. Marion True of the Getty Museum in California. When told of

these mosaics and their likely origin, the aptly-named Dr. True explained to the dealers that she had a working relationship with the Republic of Cyprus and that she was duty-bound to contact Cypriot officials about them. Dr. True called Dr. Vassos Karageorghis, the Director of the Republic's Department of Antiquities and one of the primary Cypriot officials involved in the worldwide search for the mosaics. Dr. Karageorghis verified that the Republic was in fact hunting for the mosaics that had been described to Dr. True, and he set in motion the investigative and legal machinery that ultimately resulted in the Republic learning that they were in Goldberg's possession in Indianapolis.

After their request for the return of the mosaics was refused by Goldberg, the Republic of Cyprus and the Church of Cyprus (collectively "Cyprus") brought this suit in the Southern District of Indiana for the recovery of the mosaics. Judge Noland bifurcated the possession and damages issues and held a bench trial on the former. In a detailed, thorough opinion (that occupies thirty-one pages in the Federal Supplement), Judge Noland awarded possession of the mosaics to the Church of Cyprus. Goldberg filed a timely appeal.

II. ANALYSIS

A. Jurisdiction

Subject matter jurisdiction in this action was based on diversity of citizenship under 28 U.S.C. § 1332(a)(2), which vests jurisdiction in the federal district courts for actions of sufficient value between "citizens of a State, and foreign states or citizens or subjects thereof."[*] Judge Noland found that the requirements of this subsection were met based on the following citizenships:

> Plaintiff the Republic of Cyprus is a sovereign nation located on the island of Cyprus in the Mediterranean Sea. Plaintiff Autocephalous Greek-Orthodox Church of Cyprus is a religious organization with its principal offices in Nicosia, Cyprus. Defendant Goldberg and Feldman Fine Arts, Inc. is a corporation organized and existing under the laws of the state of Indiana, with its principal place of business in Carmel, Indiana. Defendant Peg Goldberg is a citizen of the state of Indiana.

Autocephalous, 717 F. Supp. at 1377.

Goldberg did not question these facts before the district court, nor in her original jurisdictional statement and briefs filed in this court. Cyprus, for its part, asserted in its jurisdictional statement that "the Church of Cyprus is a citizen and subject of the Republic of Cyprus, and is a religious corporation under Cypriot law, maintains its principle [sic] place of business in Cyprus, and is empowered to own, regulate and administer property." Appellees' brief at 2 (citing record references). Goldberg has since filed an "Amendment to Jurisdictional Statement and Suggestion of Jurisdictional Issue," stating that she "has now concluded that the record does not appear to support diversity jurisdiction because the record does not address the

[*] In 1988, Congress amended 28 U.S.C. § 1332, changing, among other things, the language of § 1332(a)(2). Because Cyprus filed this action before May 18, 1989 (the effective date of the 1988 amendments), the pre-amended version of 28 U.S.C. § 1332(a) applies. (The changes to § 1332(a)(2) were, in any regard, only cosmetic.)

legal status and the citizenship of [the Church of Cyprus].'" She alleges that, because "she has been unable to locate evidence in the record to establish that the Church of Cyprus is incorporated under the laws of any foreign state or that the Church should be considered a 'citizen or subject' of a foreign state," the Church should be considered an unincorporated association whose citizenship includes all jurisdictions of which its members are citizens. *Cf. Hummel v. Townsend*, 883 F.2d 367 (5th Cir. 1989). Goldberg recommends at least a remand for further proceedings as to the citizenship of all of the Church's members (if any are domiciled in Indiana, the argument does, diversity is destroyed), and at best a remand with directions to dismiss for lack of jurisdiction. Neither option is warranted.

Goldberg's argument substantially misstates the issue. The primary question here is not whether the Church of Cyprus is incorporated under the laws of Cyprus. Proving that it is incorporated under Cypriot law is indeed one method for the Church to establish that it is a "citizen or subject" of Cyprus, *see Panalpina Welttransport GMBH v. Georesource, Inc.*, 764 F.2d 352, 354 (5th Cir. 1985) ("A corporation incorporated in a foreign country is a citizen of that country for diversity purposes.") (citing, *inter alia, National Steamship Co. v. Tugman*, 106 U.S. 118 (1882)); but it is only one method. The primary issue here is whether the record contains sufficient evidence that, under the laws of the Republic of Cyprus, the Church is considered a juridical entity distinct from its members, regardless of its corporate status. *See Puerto Rico v. Russell & Co.*, 288 U.S. 476, 479-82 (1933); *Cohn v. Rosenfeld*, 733 F.2d 625, 628-30 (9th Cir.

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[1] We note that the belated nature of Goldberg's "discovery" of this jurisdictional issue does not foreclose our review, as the lack of subject matter jurisdiction may be raised at any stage in the case by any party, including this court on its own motion. See Fed. R. Civ. P. 12(h)(3); *Insurance Corporation of Ireland, Ltd. v. Campagnie Des Bauxites De Guinee*, 456 U.S. 694, 701-02 (1982). *But see Buethe v. Britt Airlines, Inc.*, 787 F.2d 1194, 1196 (7th Cir. 1986) (diversity jurisdiction established where "essential facts" regarding citizenship were adequately alleged and there was no "persuasive reason" to think allegations were false); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777 (7th Cir. 1986) ("We do not suggest that the district court or this court must always or even often conduct an inquest on jurisdiction.").

1984). We stress that the citizenship status generally attributed to religious organizations under American law, as well as the characteristics of and requirements for the corporate form under American law, are irrelevant. As we stated in *Sadat v. Mertes*, 615 F.2d 1176, 1183 (7th Cir. 1980):

> The generally accepted test for determining whether a person is a foreign citizen for purposes of 28 U.S.C. § 1332(a)(2) is whether the country in which citizenship is claimed would so recognize him. This is in accord with the principle of international law that "it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to citizenship." (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898)). See generally 13B C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d, §§ 3604 & 3611 (1984).

Cyprus presented the following evidence to the district court: 1) the Constitution of the Republic of Cyprus recognizes the existence of the Autocephalous Greek-Orthodox Church of Cyprus and grants to it the "exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter;" 2) under the "Immovable Property (Tenure, Registration and Valuation) Law" of the Republic of Cyprus, a "religious corporation"—defined as a "religious establishment or religious institution belonging to any denomination and any throne, church, chapel, monastery, mosque, tekye, shrine or synagogue"—may own and register property; and 3) the Church of Cyprus registered the Kanakaria Church in the Land Registry Office of the Republic of Cyprus pursuant to this statute. (As to this last point, *see Autocephalous*, 717 F. Supp. at 1397, wherein Judge Noland discusses and describes the certificate of registration.)[1] We conclude that this evidence sufficiently established that the Church is recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity, and thus is a "citizen or subject" of that state. *Cf. Puerto Rico*, 288 U.S. at 481-82 (concluding that a Puerto

[1] As Cyprus has noted, that the Republic and the Church brought this suit as co-plaintiffs is also witness to the Republic acceptance of the Church's right to sue (and be sued) in its own name.

Rican entity known as a *sociedad en comandita* is a "juridical person" for purposes of federal jurisdiction because the Puerto Rican Code, among other things, gives sociedads the power to contract, own property, transact business and sue or be sued in its own name); *Cohn*, 733 F.2d at 628-29 (concluding that Liechtenstein regards its anstalts as "juridical persons" for purposes of diversity jurisdiction based on similar factors). *See also Swan v. First Church of Christ, Scientist*, 225 F.2d 745, 747-48 (9th Cir. 1955) (Though state law vested in the religious organizations at issue powers "far more limited than those found in the Puerto Rican *Sociedad*," the organizations would be treated as state corporations for purposes of diversity jurisdiction because state law provided that they were to be "deemed bodies corporate for the purpose of taking and holding . . . real or personal property," and other limited purposes.).

B. Choice of Law

As a federal court sitting in diversity, the district court was obligated to (and did) apply the law of the state in which it sat—Indiana. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). This included Indiana law as to which body of substantive law to apply to the case, i.e. Indiana's choice of law rules. *See Consolidated Rail Corp. v. Allied Corp.*, 882 F.2d 254, 255 (7th Cir. 1989) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). From his analysis and application of Indiana rules and decisions regarding choice of law, Judge Noland concluded that Indiana would choose to apply its own substantive law to this case. *Autocephalous*, 717 F. Supp. at 1393-95. This ruling actually contained two parts. First, Judge Noland applied the two-step "most significant contracts" test used by Indiana courts for choice of law in Indiana tort cases. *See Hubbard Mfg. Co., Inc. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987). Second, with the help of the trial testimony of an expert in the law of Switzerland, Judge Noland looked to Swiss choice of law principles and determined that they, too, dictate that Indiana substantive law should control. On appeal, Goldberg claims that both of these determinations were in error. Because we find Judge Noland's analysis

under Indiana law to be free of error,[9] we affirm his conclusion that Indiana law applies without reaching his discussion of Swiss law.

The district court properly considered Cyprus' suit to recover the mosaics a replevin action, long recognized in Indiana law as the proper legal action for the recovery of wrongfully detained personal property. See 25 Indiana Law Encyclopedia ("I.L.E.") *Replevin* §§ 1, 2 & 11 (West 1960). The district court could find no Indiana case dealing specifically with choice of law in replevin actions, nor can we. Thus, we will look (as did Judge Noland) to the choice of law principles Indiana generally applies in tort cases.[10]

In *Hubbard*, 515 N.E.2d 1071, the Indiana supreme court modified Indiana's traditional *lex loci delicti commissi* rule for choice of law in tort cases. Under the traditional rule, the court chose the law of the state in which occurred "the last event necessary to make an actor liable," most times meaning the place

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[9] We must employ a mixed standard of review as to this determination by Judge Noland. His conclusions as to the relevant Indiana choice of law principles, as legal conclusions, would ordinarily be reviewed *de novo*. *See, e.g., Forum Corp. of America v. Forum, Ltd.*, 903 F.2d 434, 438 (7th Cir. 1990). As we have often stated, however, we give an extra measure of deference in diversity cases to the district judge's interpretation of the law of the state in which he sits. *See PPG Indus., Inc. v. Russell*, 887 F.2d 820, 823 (7th Cir. 1989) (citing cases); *Goldstick v. IMC Realty*, 788 F.2d 456, 466 (7th Cir. 1986) (same). Judge Noland's findings as to the facts necessary to resolve this issue, as well as his application of the law to these facts, will be reversed only upon a showing of clear error. *See Forum*, 903 F.2d at 438 (clearly erroneous standard for factual findings under Fed. R. Civ. P. 52(a)); *David Berg and Co. v. Gatto Int'l Trading Co., Inc.*, 884 F.2d 306, 309 (7th Cir. 1989) (clearly erroneous standard for district court's application of law to fact).

[10] We chose tort principles because, as it is invoked by Cyprus, replevin, a free-standing cause of action in Indiana, is identical in all relevant respects to a tort claim for conversion. *Compare* 25 I.L.E. *Replevin* § 45 (plaintiff's burden in replevin claim) *with Noble v. Moistner*, 388 N.E.2d 620, 621-22 (Ind. App. 1979) (elements of conversion claim). We note that Goldberg claims error in Judge Noland's decision similarly to look to tort principles, and expends a great deal of effort arguing conflict of laws principles used in actions involving the transfer of chattels, which is apparently how this action would be characterized under Swiss law. As to the application of Indiana law and principles, Goldberg's argument entirely misses the mark.

of injury. *Id.* at 1073. *See also Consolidated Rail*, 882 F.2d at 256. Citing the often anomalous results that can obtain from the rigid application of this rule, as well as the recent trend away from it, the court in *Hubbard* declared that the *lex loci* rule should be applied only when the place of the tort is also the place with the most significant contacts. When the place of the tort bears little connection to the legal action, the court declared, the following factors should be considered:

> 1) the place where the conduct causing the injury occurred;
>
> 2) the residence or place of business of the parties; and
>
> 3) the place where the relationship is centered.

Id. at 1073-74 (citing Restatement (Second) of Conflicts of Laws § 145(2) (1971)). *See also Tompkins v. Isbell*, 543 N.E.2d 680 (Ind. App. 1989) (discussing and applying *Hubbard* approach). Thus, the court established a two-step test, the first inquiry focusing on the contacts between the place of the wrong and the legal action. If these contacts are significant, the *lex loci* rule should be applied; if not, the court should move to the second injury, which focuses on which jurisdiction has the most significant contacts.

In this case, Judge Noland first determined that Switzerland—"the place of the wrong" because it was at the Geneva airport that Goldberg took possession and control of the mosaics—bears little connection to Cyprus' cause of action. *Autocephalous*, 717 F.Supp. at 1393-94. He reached this conclusion based on his findings regarding the following facts: no Swiss citizen has or ever had an interest in this action, as none of the parties, actors in the transaction, or past or current interestholders are Swiss citizens; and the temporal and geographical connection between the mosaics and Switzerland were "fortuitous and transitory," as the mosaics were on Swiss soil for only four days, never passed through Swiss customs (they remained in the "free port" area of the Geneva airport), and never otherwise entered the Swiss stream of commerce. Goldberg has failed to establish error in either these factual findings or the conclusion based thereon, choosing instead to reiterate Swiss "connections"

considered and rejected by Judge Noland (e.g. the money Peg Goldberg paid for the mosaics was wired to her through a Swiss bank), and to cite us to an Indiana court's application of the lex loci doctrine in a factually inapposite case. *Tompkins*, 543 N.E.2d at 681-82 (law of place of tort applied in auto collision case where "the place of tort has extensive connection with the legal action"). Thus, we agree that in this case an Indiana court would find Switzerland's contacts too attenuated to apply the *lex loci* rule, and thus would proceed to the second step of the analysis. *Cf. Hubbard*, 515 N.E.2d at 1074. (events in Illinois unrelated to the action do not equal significant contacts).

Moving to step two of the *Hubbard* approach, the contacts between the action and the two contending jurisdictions (Indiana and Switzerland) must be reviewed, with special attention given to the Second Restatement factors. Applying this approach, Judge Noland noted the the following facts that weigh in favor of applying Indiana law: the defendants, those who financed and effected the transfer of the mosaics, and those who now hold the principal monetary interests in the mosaics are all Indiana citizens; the money used to purchase the mosaics came from an Indiana bank; the agreement among Goldberg, Fitzgerald, van Rijn and Faulk stipulates that Indiana law will apply, indicating Goldberg's reliance on the law of her home state; and the mosaics are presently being held in Indiana, where they have been stored since they entered the U.S. in July, 1988. Based on our review of these and other facts as found by Judge Noland, we agree with his conclusion that Indiana has the more significant contacts with and interest in this action. Thus, Indiana law and rules govern every aspect of this action, from the statute of limitations issues through the application of the substantive law of replevin.

C. Statute of Limitations

With great zeal, Goldberg has from the beginning of the action challenged the timeliness of Cyprus' complaint. Under Indiana's statute of limitations for replevin actions, Cyprus had six years from the time its cause of action accrued in which to sue for the recovery of the mosaics. Ind. Code § 34-1-2-1 (1982). Though the exact date of the looting of the Kanakaria Church is

unknown, it is agreed that Cyprus first learned of the theft of their mosaics in November, 1979. It is also agreed that Cyprus first learned that the mosaics were in Goldberg's possession in late 1988. If Cyprus' cause of action accrued on the former date, their complaint, filed in March, 1989, was untimely. If, on the other hand, it accrued on the latter date (or at any other point after March, 1983), their complaint was timely. Thus, the dispositive determination is when did Cyprus' cause of action "accrue" within the meaning of Indiana's limitations statute.

The determination of when Cyprus' cause of action accrued involves the interpretation of Indiana authorities and their application to the facts of this case. As we state above, *supra* at note 9, we give substantial deference to the district court's resolution of such issues, as we assume that the district court has greater expertise in interpreting and applying the law of the state in which it sits. Our review of Judge Noland's statute of limitations analysis convinces us that he has here proved true that assumption.

As Judge Noland noted, it is well-established in Indiana law that it is the courts' responsibility to determine, based on the facts of each case, when the cause of action accrues. *See, e.g., Burks v. Rushmore*, 534 N.E.2d 1101, 1103 (Ind. 1989). In carrying out this responsibility, Indiana courts start with the following general rule: a cause of action accrues when the plaintiff ascertains, or by due diligence could ascertain, actionable damages. *Burks*, 534 N.E.2d at 1103-04 (citing, *inter alia*, *Barnes v. A.H. Robbins Co., Inc.*, 476 N.E.2d 84 (Ind. 1985)). Several Indiana decisions have recognized, as a corollary to this general rule, a "discovery rule" for the accrual of a cause of action; *to wit*, "the statute of limitations commences to run 'from the date plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another.' " *Burks*, 534 N.E.2d at 1104 (quoting *Barnes*, 476 N.E.2d at 87-88). Although the first enunciation of the discovery rule was quite guarded, *see Barnes*, 476 N.E.2d at 87, Indiana courts have since evidenced a willingness to extend it to new types of cases and situations. *See, e.g., Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989); *Burks*, 534 N.E.2d at

1103-04; *Groen v. Elkins*, 551 N.E.2d 876, 879 (Ind. App. 1990). *See also Walters v. Owens-Corning Fiberglass Corp.*, 781 F.2d 570, 572 (7th Cir. 1986).

Apart from but related to the discovery rule, Indiana recognizes, by both statute and case law, the doctrine of fraudulent concealment. Under this doctrine, a defendant who has by deceit or fraud prevented a potential plaintiff from learning of a cause of action cannot take advantage of his wrongdoings by raising the statute of limitations as a bar to plaintiff's action. *See* Ind. Code § 34-1-2-9 (1982); *Burks*, 534 N.E.2d at 1104.[11]

Central to both the discovery rule and the doctrine of fraudulent concealment is the determination of the plaintiff's diligence in investigating the potential cause of action. *See Burks*, 534 F.2d at 1103 (under discovery rule, statute begins to run when damage was "ascertained or ascertainable by due diligence"); *Guy v. Schuldt*, 138 N.E.2d 891, 896 (ind. 1956) (despite fraudulent concealment, if plaintiff was not reasonably diligent in discovering fraud "the statute will run from the time discovery ought to have been made").

Applying these Indiana rules and principles to this case and unguided by any directly analogous Indiana precedent, Judge Noland concluded that an Indiana court would find that Cyprus' action was timely filed. *Autocephalous*, 717 F. Supp. at 1388-93. His primary ground for so concluding was his determination that, under a discovery rule, Cyprus' cause of action did not accrue until Cyprus learned from Dr. True that the mosaics were in Goldberg's possession in Indiana. In so holding, he looked not only to Indiana cases but also to general discovery rule principles, *see* 51 Am.Jur.2d *Limitation of Actions* § 146 (1970); 54 C.J.S. *Limitation of Actions* § 87 (1987); and to *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980), a decision of the New Jersey Supreme

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[11] Judge Noland also discusses the doctrine, recognized by Indiana courts, of equitable estoppel. *Autocephalous*, 717 F. Supp. at 1388. As this doctrine is identical in all respects relevant here to the statutory doctrine of fraudulent concealment, *see, e.g., Spoljaric v. Pangan*, 466 N.E.2d 37, 44-45 (Ind. App. 1984); *Weinstock v. Ott*, 444 N.E.2d 1227, 1235-36 (Ind. App. 1983), and as the application of the discovery rule alone adequately resolves the issue in this case, we will not explore further this equitable doctrine.

Court addressing the accrual of a cause of action in the context of a replevin action involving a work of art. (In *O'Keeffe*, the court held that artist Georgia O'Keeffe's cause of action for replevin of three paintings stolen from a gallery in 1946 accrued "when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings." 416 F.2d at 870.) Further, Judge Noland found, as a necessary pre-condition to the application of the discovery rule, that Cyprus exercised due diligence in searching for the mosaics. Thus, Judge Noland ruled that Cyprus was not, nor reasonably should have been, on notice as to the possessor or location of the mosaics until late 1988. *Autocephalous*, 717 F. Supp. at 1389-91.

Goldberg attacks Judge Noland's discovery rule analysis on two grounds. First, she charges that in applying the discovery rule in this case Judge Noland "announced a new rule of Indiana law in conflict with established Indiana limitations principles." Not so. Judge Noland applied legal principles set out in Indiana cases, and generally accepted elsewhere, to a new situation not yet addressed by the Indiana courts, exactly what a district court sitting in diversity is obligated to do when presented with a novel issue under state law. *See* 19 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4507 (1984). Further, his conclusion that in this case the operative "discovery" had to include the identify of the holder of the mosaics is eminently sound. In the context of a replevin action for particular, unique and concealed works of art, a plaintiff cannot be said to have "discovered" his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that "other" is. *See O'Keeffe*, 416 A.2d at 869-70. Further, we note that any "laziness" this rule might at first blush invite on the part of plaintiffs is heavily tempered by the requirement that, all the while, the plaintiff must exercise due diligence to investigate the theft and recover the works.

Second, Goldberg attacks Judge Noland's due diligence finding. Specifically, she argues that Cyprus failed to contact several organizations it should have, particularly IFAR and

Interpol. She also repeats the argument she made to Judge Noland that events occurring before the end of 1983[12] should have started the clock ticking on Cyprus' cause of action, with particular emphasis on an article that appeared in a Turkish newspaper. We note first that the due diligence determination is, as Judge Noland noted, highly "fact-sensitive and must be decided on a case-by-case basis." *Autocephalous*, 717 F. Supp at 1389. Although Goldberg cites some support for a *de novo* standard of review on this issue, *see DeWeerth v. Baldinger*, 836 F.2d 103, 110 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2823 (1988), we ordinarily review determinations such as this, which involve the application of law to facts, under the "clearly erroneous" standard. *See supra* at note 9. *See also Mucha v. King*, 792 F.2d 602, 604-06 (7th Cir. 1986). Further, in this case the assessment of Cyprus' diligence necessarily involves a contextual analysis of "a particular and nonrecurring set of historical events," *Mucha*, 792 F.2d at 605, as well as an assessment of the credibility of the various witnesses who testified as to what Cypriot officials knew and when they knew it. Thus, there is substantial support for a very deferential standard of review. *Cf. Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321, 1325-27 (5th Cir. 1987) (due diligence finding reviewed under clearly erroneous standard). Under any standard of review, however, Judge Noland's due diligence determination must be affirmed.

The record evidence (summarized above) makes it clear that, although the Republic of Cyprus may not have contacted all the organizations Goldberg in hindsight would require, it took substantial and meaningful steps, from the time it first learned of the disappearance of the mosaics, to locate and recover them. The efforts by the Republic's officials, targeted at the likely points of sale of the mosaics, were sweeping and consistent with trade practices. Indeed, one expert, a curator from The Walters Art Gallery in Baltimore, Maryland, testified at trial that Cyprus

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[12] Note that any events occurring after 1983, including the acquisition in 1984 by the Menil Foundation in Texas of other Kanakaria mosaic fragments and frescoes from Dikman (of which Goldberg makes much), even if they triggered the accrual of Cyprus' six-year statute of limitations, would not make Cyprus' March 1989 complaint untimely.

"stands apart" in its efforts to recover stolen cultural properties. *Autocephalous*, 717 F. Supp. at 1389 (quoting testimony of Dr. Vikan). As to Goldberg's repetition here of her arguments regarding the article in the Turkish publication and the other events, the record adequately supports Judge Noland's conclusion that these events did not nor should have put Cyprus on notice as to a possible cause of action. The article, which fingered Dikman as a man wanted in Cyprus and Turkey for smuggling artifacts and later mentioned the mosaics from the Kanakaria Church, did not reveal that Dikman might be in possession of the mosaics' from the Kanakaria Church. What's more, the record reveals that, upon learning of such Turkish press reports, Cyprus redoubled its efforts at notification and recovery. In sum, then, Judge Noland's conclusion that Cyprus was duly diligent and should not have discovered its cause of action before late 1988 stands on firm factual footing. Goldberg's fervent attack on this conclusion at most establishes that an alternative view of the evidence was plausible, which is not enough to merit our disturbing it.

Judge Noland backstopped his discovery rule analysis by also applying the doctrine of fraudulent concealment to the facts of this case. From that application, Judge Noland concluded that the statute of limitations on Cyprus' action was tolled until at least the end of 1983, and thus Cyprus' March, 1989 complaint was timely. *Autocephalous*, 717 F. Supp. at 1391-93. Goldberg takes issue with this conclusion, arguing, *inter alia*, that it is counter to Indiana law as expressed in *Landers v. Evers*, 24 N.E.2d 796 (1940), a case Judge Noland distinguished on the ground that, in Landers, the court found that the plaintiff did not exercise due diligence. Because we find no error in Judge Noland's analysis and application of the discovery rule, we need not and will not pass on the fraudulent concealment issue. Similarly, because we find no error in Judge Noland's determination that Cyprus was duly diligent and their action timely filed, we agree with his decision to reject without further discussion Goldberg's laches and estoppel arguments, and we follow the same prudent course.

D. The Merits of the Replevin Claim

Under Indiana law, replevin is an action at law "whereby the owner or person claiming the possession of personal goods may recover such personal goods where they have been wrongfully taken or unlawfully detained." 25 I.L.E. *Replevin* § 1. "The gist of the action is the defendant's unlawful detention of the plaintiff's property. The issue litigated is the present right to the possession of the property in controversy, and the purpose of the action is to determine who shall have possession of the property sought to be replevied." *Id.* at 2 (citations omitted). *See also State Exchange Bank of Culver v. Teague*, 495 N.E.2d 262, 266 (Ind. App. 1986). To recover the item sought to be replevied, (which is the primary remedy in a replevin action, *see Kegerreis v. Auto-Owners Insurance Co.*, 484 N.E.2d 976, 982 (Ind. App. 1985)), the plaintiff must establish three elements: "his title or right to possession, that the property is unlawfully detained, and that the defendant wrongfully holds possession." 25 I.L.E. *Replevin* § 42 (citations omitted). *See also Snyder v. International Harvester Credit Corp.*, 261 N.E.2d 71, 73 (Ind. App. 1970).

Judge Noland applied these elements to the facts of this case and determined that Cyprus had met its burden as to each. *Autocephalous*, 717 F. Supp. at 1397-1400. Our review of this application of Indiana law to the facts convinces us that it is free of error: 1) the Kanakaria Church was and is owned by the Holy Archbishopric of the Church of Cyprus, a self-headed (hence "Autocephalous") church associated with the Greek-Orthodox faith; 2) the mosaics were removed from the Kanakaria Church without the authorization of the Church or the Republic (even the TRNC's unsuccessful motion to intervene claimed that the mosaics were improperly removed); and 3) Goldberg, as an ultimate purchaser from a thief, has no valid claim or title or right to possession of the mosaics.[13]

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[13] The only allegation of error as to this analysis raised by Goldberg regards the first element. Goldberg claims that certain decrees of the Turkish administration in northern Cyprus stripped the Church of its claim of title to the Kanakaria Church and any movable property contained therein or taken therefrom. This allegation is discussed in a separate section below.

We note that Judge Noland again backstopped his conclusion, this time conducting an alternative analysis under Swiss substantive law. *See Autocephalous*, 717 F. Supp. at 1400-04. Briefly, the court concluded that the Church had superior title under Swiss law as well, because Goldberg could not claim valid title under the Swiss "good faith purchasers" notion having only made a cursory inquiry into the suspicious circumstances surrounding the sale of the mosaics. (Under Indiana law, such considerations are irrelevant because, except in very limited exceptions not applicable here, a subsequent purchaser (even a "good faith, *bona fide* purchaser for value") who obtains an item from a thief only acquires the title held by the thief; that is, no title. 6 I.L.E. *Conversion* § 15.) As we state above, Indiana law controls every aspect of this action. Thus, Judge Noland's extensive (and quite interesting) discussion of Swiss law, as well as Goldberg's lengthy attack thereon, need not be reviewed. Cyprus adequately established the elements of replevin under Indiana law, on which ground alone we affirm the district court's decision to award the possession of the mosaics to the Church of Cyprus.

E. The Effect of the TFSC Edicts

Finally, Goldberg argues that several decrees of the TFSC (the entity established in northern Cyprus by the Turkish military immediately after the 1974 invasion) divested the Church of title to the mosaics.[14] Goldberg asks us to honor these decrees under the notion that in some instances courts in the United States can give effect to acts of nonrecognized but "*de facto*" regimes if the acts relate to purely local matters. *See Restatement (Third) of the Foreign Relations Law of the United States ("Third Restatement")* § 205(3) (1987);[15] *Samiloff v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933) (Under Soviet law, U.S.S.R. nationalization decree effective to pass title to oil within

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[14] Judge Noland ignored these decrees, presented to him at the latter stages of the trial and in a lengthy post-trial submission, as irrelevant.

[15] This Restatement section provides:

> [C]ourts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only.

Russia despite fact that U.S.S.R. was not yet recognized by the U.S.). The TFSC decrees at issue, all propagated in 1975, are principally these: 1) the "Abandoned Movable Property Law," which provided that all movable property within the boundaries of the TFSC abandoned by its owner because of the owner's "departure" from northern Cyprus "as a result of the situation after 20th July 1974" now belongs to the TFSC "in the name of the Turkish Community" and that the TFSC "is responsible for the possession and control of such property;" and 2) the "Antiquities Ordinance," which provided that all religious buildings and antiquities, including specifically "synagogues, basilicas, churches, monasteries and the like," located north of the Green Line, as well as any and all "movable antiquities" contained therein, are now the property of the TFSC.[14] Because these decrees were enacted before the Kanakaria Church was looted and its mosaics stolen, the argument concludes, the Church cannot here claim to hold title to the mosaics.

It is helpful to note at the outset what is not being claimed here. First, Goldberg does not (and cannot) suggest that this court should pass on the validity of the Turkish administration in northern Cyprus. We repeat here precepts that are well-established in the law of this country:

> [T]he conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power [is] not subject to judicial inquiry or decision, . . . [and] who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts[.]

United States v. Belmont, 301 U.S. 324, 328 (1937) (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918)). Indeed, Goldberg herself supports the district court's decision to deny the TRNC's motion to intervene in this case, which decision was based on the TRNC's continued status as a nonrecognized entity.

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[14] We note that Cyprus has raised arguments that cast substantial doubt on the actual meaning and effect of these and other TFSC decrees, even should we decide to apply them. Fir the purposes of disposing of Goldberg's argument, however, we will assume that the TFSC decrees actually mean what Goldberg represents them to mean.

See Third Restatement § 205(1) (entity not recognized as a state ordinarily denied access to U.S. courts); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (8th Cir. 1977).

Second, this is not a case in which one part is claiming title under the laws of a state that has been entirely displaced, and the other is claiming title under the laws of the new, displacing regime. All Goldberg can hope to gain from the invocation of these TFSC edicts is a finding that the Church's claim of title is defective; she has no plausible claim of valid title herself based on these edicts. This fact sets this case apart from the cases cited by Goldberg, including *Salimoff*, 186 N.E 279 (plaintiff Russian nationals claimed title to property under laws of the old Russian Empire and defendant U.S. companies claimed title due to purchase from Soviet government, which seized the property pursuant to nationalization decree); and *The Denny*, 127 F.2d 404 (3d Cir. 1942) (dispute between Lithuanian citizens wherein both claimed right to possess property as agents under Lithuanian law, one relying on the effect of nationalization decrees of the Lithuanian Soviet Socialist Republic, the other on pre-nationalization law). *See also Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.*, 1 Q.B. 205 (C.A. 1977), *aff'd*, A.C. 508 (H.L. 1978) (House of Lords declined to allow suit which would require British courts to determine who had the superior claim of title to hotels in northern Cyprus as between the pre-invasion owners or the owners recognized and protected by the Turkish administration).

What Goldberg is claiming is that the TFSC's confiscatory decrees, adopted only one year after the Turkish invasion, should be given effect by this court because the TFSC and its successor TRNC should not be viewed as the "*de facto*" government north of the Green Line. This we are unwilling to do. We draw on two lines of precedent as support for our decision. First, we note that, contrary to the New York court's decision in *Samiloff*, 186 N.E. 279, several courts of the same era refused to give effect to the nationalization decrees of the as-yet-unrecognized Soviet Republics. These courts relied on a variety of grounds, including especially the fact that the political branches of our government still refused to recognize these entities. *See, e.g. Latvian Satte Cargo*

& Passenger S.S. Line v. McGrath, 188 F.2d 1000, 1002-04 (D.C. Cir. 1951) (also stating as a possible alternative ground the following view: "since the nationalization decrees here involved were confiscatory and thus contrary to the public policy of this country, our courts would in no event give them effect," and citing cases); *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944) ("[N]o valid distinction can be drawn between the political or diplomatic act of nonrecognition of a sovereign and nonrecognition of the decrees or acts of that sovereign . . . Nonrecognition of a foreign sovereign and nonrecognition of its decrees are to be deemed to be as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition.") (citing *United States v. Pink*, 315 U.S. 203 (1942)). Similarly, as regards the Turkish administration in northern Cyprus, the United States government (like the rest of the non-Turkish world) has not recognized its legitimacy, nor does our government "recognize that [the Turkish administration] has functioned as a de facto or quasi government . . ., ruling within its own borders." *Salimoff*, 186 N.E. at 682 (relying on the fact that the U.S. government had so "recognized" the Soviet government).

Second, we are guided in part by the post-Civil War cases in which courts refused to give effect to property-affecting acts of the Confederate state legislatures. In one such case, *Williams v. Bruffy*, 96 U.S. 176 (1878), the Supreme Court drew a helpful distinction between two kinds of "de facto" governments. The first kind "is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to represent in facts the sovereignty of the nation." *Id.* at 185. This kind of *de facto* government, the Court explained, "is treated as in most respects possessing rightful authority, . . . [and] its legislation is in general recognized." *Id.* The second kind of *de facto* government "is such as exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. . . . If it

succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation." *Id.* at 186. (The Court held that the Confederacy was a government of the second type that ultimately failed.) Goldberg argues that the TFSC and its successor TRNC have achieved the level of "ultimate success" contemplated by this standard, because they have maintained control of the territory north of the Green Line for over fifteen years. We will not thus equate simple longevity of control with "ultimate success." The Turkish forces, despite their best efforts, did not completely supplant the Republic nor its officers. Instead, the TFSC and the TRNC, neither of which has ever been recognized by the non-Turkish world, only acceded to the control of northern portion of Cyprus. The Republic of Cyprus remains the only recognized Cypriot government, the sovereign nation for the entire island. Rejecting Goldberg's invitation to delve any further into facts and current events which are not of record in this proceeding, we conclude that the confiscatory decrees proffered by Goldberg do not divest the Church of its claim of title.

III. CONCLUSION

As Byron's poem laments, war can reduce our grandest and most sacred temples to mere "fragments of stone." Only the lowest of scoundrels attempt to reap personal gain from this collective loss. Those who plundered the churches and monuments of war-torn Cyprus, hoarded their relics away, and are now smuggling and selling them for large sums, are just such blackguards. The Republic of Cyprus, with diligent effort and the help of friends like Dr. True, has been able to locate several of these stolen antiquities; items of vast cultural, religious (and, as this case demonstrates, monetary) value. Among such finds are the pieces of the Kanakaria mosaic at issue in this case. Unfortunately, when these mosaics surfaced they were in the hands not of the most guilty parties, but of Peg Goldberg and her gallery. Correctly applying Indiana law, the district court determined that Goldberg must return the mosaics to their rightful owner: the Church of Cyprus. Goldberg's tireless attacks have not established reversible error in that determination, and thus, for the reasons discussed above, the district court's judgment is AFFIRMED.

Lest this result seem too harsh, we should note that those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means by which to protect themselves. Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more than make a few last-minute phone calls. As testified to at trial, in a transaction like this, "All the red flags are up, all the red lights are on, all the sirens are blaring." *Autocephalous*, 717 F.Supp. at 1402 (quoting testimony of Dr. Vikan). In such cases, dealers can (and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like. If Goldberg would have pursued such methods, perhaps she would have discovered in time what she has now discovered too late: the church has a valid, superior and enforceable claim to these Byzantine treasures, which therefore must be returned to it.

CUDAHY, *Circuit Judge*, concurring:

I.

Although I concur in all respects in the excellent majority opinion, there are two points that I believe merit elucidation. The first of these involves the difficult problem of the time of accrual of the cause of action in replevin. The majority opinion affirms the holding of the district court, based on its interpretation of Indiana law, that the plaintiff's cause of action does not accrue until it has, or *reasonably should have*, discovered the location of the stolen property—in this case the Cypriot mosaics. Although we accept the district court's construction of Indiana law, it is unnecessary to rely solely upon this application of the discovery rule. For, as a recent study of the law of missing property demonstrates, whenever the possessor of lost or stolen personal property commits "fraud in the concealment," the statute of limitations does not run against the original owner until that owner has *actual knowledge* of the location of the property and of the identity of the possessor.[1]

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[1] Gerstenblith, *The Adverse Possession of Personal Property*, 37 Buffalo L. Rev. 119, 127 (1989).

This concept is analogous to the requirement that one who asserts a stature of limitations defense against an action for the recovery of real property must have possessed the property in an "open and notorious" manner. Because it is difficult to assess openness of possession in the realm of personal property, courts have required good faith on the part of the possessor to satisfy, or substitute for, the openness requirement. Most courts considering this problem have thus concluded that the statute of limitations should not run against an original owner who lacks the facts necessary to institute suit as long as the property is held by the original thief or by a subsequent holder acting in bad faith.[2]

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[2] *See, e.g., Frye v. Commonwealth Inv. Co.*, 107 Ga. App. 739, 741, 131 S.E.2d 569, 571, *aff'd*, 219 Ga. 498, 134 S.E.2d 39 (1963); *Commercial Union Ins. Co. v. J. A. Connolly*, 183 Minn. 1, 6, 235 N.W. 634, 636 (1931); *Lightfoot v. Davis*, 198 N.Y. 261, 266, 91 N.E. 582, 583-84 (1910). *See generally* Gerstenblith, *supra* note 1, at 126-31.

The "demand and refusal" rule applied by the New York courts, however, constitutes one exception to this general approach. Under the "demand and refusal" rule, the statute of limitations for a replevin action does not run until the original owner makes a demand of the current possessor for the return of the property and the possessor refuses. *See, e.g., DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2823 (1988); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *Menzel v. List* 22 A.D.2d 647, 653 N.S.S.2d 43 (1964), and 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *modification rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969). An old Indiana decision, in fact, holds that the original owner of stolen property cannot sue the good faith possessor for conversion until the owner has made a demand upon the possessor for the return of the property. *See Wood v. Cohen & Another*, 6 Ind. 455 (1855). The original purpose of this rule was to protect the good faith possessor who, upon learning of the original theft, would presumably return the property to the rightful owner voluntarily and without need for litigation.

Some courts adopt a slightly different approach—the *O'Keeffe* "discovery" rule—emphasizing the due diligence of the original owner, as in *O'Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980), rather than lack of good faith on the part of the possessor. In *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), the Second Circuit, exercising its diversity jurisdiction and interpreting New York law, found that New York's "demand and refusal" rule incorporates the requirement that the original owner exercise reasonable diligence in locating the stolen property. In a recent statement on the subject by a New York

(Footnote continued on next page)

If a good faith requirement were applied to the facts of the case before us, the statute of limitations would not have begun to run so long as the mosaics were in the hands of Dikman, the original thief. Nor would Goldberg's purchase of the mosaics in July 1988 have triggered the running of the statute. As Judge Noland pointed out, Goldberg undertook only a cursory inquiry into Dikman's ability to convey good title under circumstances which should have aroused the suspicions of a wholly innocent and reasonably prudent purchaser. She thus does not appear to have been a good faith purchaser. Under the foregoing analysis, the cause of action would not have accrued until late in 1988, when Cyprus first ascertained the location of the mosaics and the identify of the current possessor. This approach, which seems equitable to me, thus poses no bar to a cause of action for replevin of the mosaics. An owner should not be at risk under the statute of limitations until she has actual knowledge or the property has passed into innocent hands.

(Footnote continued from previous page)

court, however, the defense was characterized as one of laches, rather than as a statute of limitations bar. The laches defense required a showing of prejudice to the defendant by the delay as well as knowledge or imputed knowledge on the part of the plaintiff and a showing of reasonableness of the plaintiff's conduct under the particular circumstances. See *Solomon R. Guggenheim Foundation v. Lubell*, 153 A.D.2d 143, 550 N.Y.S.2d 618 (N.Y. App. Div. 1990), *leave to appeal to the N.Y. Court of Appeals granted*, 554 N.Y.S.2d 992 (1990). The New York appellate court, in remanding to the trial court, was reluctant to conclude that the defendant was prejudiced by any asserted delay by the plaintiff even though the defendant was arguably a good faith purchaser of the stolen art works. The court there states that the "defendant's vigilance is as much in issue as plaintiff's diligence." 153 A.D.2d at 152, 550 N.Y.S.2d at 623. The emphasis in the present case on Cyprus' diligence should also be tempered by the plaintiff's lack of good faith, as found by Judge Noland. Lack of good faith minimizes the likelihood of prejudice to the defendant. Following the *Lubell* decision, a judge in the Southern District of New York recently denied a motion to dismiss by the defendant in a suit in which the Turkish government is attempting to recover various archaeological materials from the Metropolitan Museum of Art. Judge Broderick denied defendant's motion based on the statute of limitations, so that the issues of prejudice allegedly caused by plaintiff's delay and the defendant's good faith could be extensively considered. *See* N.Y. Times, July 20, 1990, at C 25, col. 1.

II.

A second and unrelated, but important, aspect of this case involves the treatment of the cultural heritage of foreign nations under international and United States law. The United States has both acceded to international agreements and enacted its own statutes regarding the importation of cultural property. These regulatory efforts have encompassed transfers of property during both wartime and peacetime and apply whether the property was originally stolen or "merely" illegally exported from the country of origin. The two most significant international agreements that attempt to protect cultural property are the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict (the "1954 Hague Convention"), 249 U.N.T.S. 215 (1956), and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Transport, Export and Transfer of Ownership of Cultural Property (the "UNESCO Convention"), 823 U.N.T.S. 231 (1972). Under both these multinational treaties, as well as under the United States' Cultural Property Implementation Act, 19 U.S.C. § 2601 *et seq.* (1983), the Cypriot mosaics would be considered cultural property warranting international protection. For example, Article I of the UNESCO Convention defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to one of more of the following categories:

> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
>
> (e) antiquities more than one hundred years old . . .;
>
> (g) property of artistic interest, such as:
>
> > (i) pictures, paintings and drawings produced entirely by hand on any support and in any material . . . ."

The 1954 Hague Convention may be applicable to the case before us given the incursion of Turkish armed forces into Cyprus

in 1974 and our ongoing refusal to recognize the government established in the northern part of Cyprus. The 1954 Hague Convention, which is but the most recent multilateral agreement in a 200-year history of international attempts to protect cultural property during war time,[3] prohibits the destruction or seizure of cultural property during armed conflict, whether international or civil in nature, and during periods of belligerent occupation. The Hague Convention also applies to international trafficking during peacetime in cultural property unlawfully seized during an armed conflict. The attempt of the government established in northern Cyprus by the Turkish military to divest the Greek Cypriot church of ownership of the mosaics might be viewed as an interference of the sort contemplated by the 1954 Hague Convention. If this were the case, the acts and decrees of the northern Cyprus government divesting title to this cultural property would not demand the deference of American courts.

The second international agreement, the UNESCO Convention, focuses on private conduct, primarily during peacetime, and thus is also applicable to the theft and removal of the mosaics from Cyprus.[4] Article 7 of that Convention requires signatory nations:

> (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported . . .;

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[3] For more detailed discussion of this two hundred year development, see Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 Syracuse J. of Int'l Law and Commerce 281, 287-97 (1983).

[4] For a more detailed discussion of the UNESCO Convention, see Jora, *The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property?* 13 Brooklyn J. Int'l L. 55, 62-66 (1987), and for discussion of the United States' implementation of the UNESCO Convention, see Note, *Harmonious Meeting: the McClain Decision and the Cultural Property Implementation Act*, 19 Cornell Int'l L.J. 311, 318-21 (1986).

> (b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party..., provided that such property is documented as appertaining to the inventory of the institution;
>
> > (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property . . . ., provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property . . . .

It is clear that the mosaics in the case before us were stolen (under any reasonable definition of that word) from a religious institution and that the mosaics were extensively documented by the Dumbarton Oaks publication as belonging to the Kanakaria Church. While the UNESCO Convention seems to contemplate primarily measures to be implemented by the executive branch of a government through its import and export rules and policies, the judicial branch should certainly attempt to reflect in its decisionmaking the spirit as well as the letter of an international agreement to which the United States is a party

The UNESCO Convention, although ratified by Congress in 1972, was not formally implemented in the United States until the enactment of the Cultural Property Implementation Act in 1983. The Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613, focuses primarily on implementation of Articles 7(b) and 9 of the UNESCO Convention, which call for concerted action among nations to prevent trade in specific items of cultural property in emergency situations. The delay in the enactment of the Cultural Property Implementation Act apparently was caused, in part, by pressure from art dealers and traders, who argued that if the United States undertook unilateral import controls, illegal cultural property would simply be sold to those art market countries lacking similar import controls. In fact, the Cultural Property Implementation Act was perhaps finally enacted only because it was perceived as a restraint of sorts on

certain Customs officers. These officials had deemed all archaeological materials, which a foreign country had claimed were "stolen," to be subject to seizure under the National Stolen Property Act, 18 U.S.C. § 2311 *et seq.* (1934). The Cultural Property Implementation Act, therefore, emphasized the need for concerted action and, in particular, seemed to prefer action resulting from bilateral treaties between the United States and the affected source countries. Such treaties have now been put into effect with a few countries, including Mexico, Guatemala and Peru.

As indicated, the Cultural Property Implementation Act addresses primarily the question of import controls and, in section 2607, prohibits the importation into the United States of any "cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution . . . ." This section is not directly applicable here, first, because the mosaics were stolen after the effective date of the statute and, second, because the statute is directed at import controls rather than replevin suits. Nonetheless, the policy that the Act embodies is clear: at the very least, we should not sanction illegal traffic in stolen cultural property that is clearly documented as belonging to a public or religious institution. This is particularly true where this sort of property is "important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people." 19 U.S.C. § 2601(2)(C)(ii)(II).

Focusing on a relatively short segment of what might otherwise be considered its "history," the United States chooses in considerable measure to ignore the ancient cultural heritage of the land which it now occupies. But a short cultural memory is not an adequate justification for participating in the plunder of the cherished antiquities that play important roles in the histories of foreign lands. The UNESCO Convention and the Cultural Property Implementation Act constitute an effort to instill respect for the cultural property and heritage of all peoples. The mosaics before us are of great intrinsic beauty. They are the

virtually unique remnants of an earlier artistic period and should be returned to their homeland and their rightful owner. This is the case not only because the mosaics belong there, but as a reminder that greed and callous disregard for the property, history and culture of others cannot be countenanced by the world community or by this court.

A true Copy:

Teste:

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Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 21, 1990

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILBUR F. PELL, JR., Senior Circuit Judge

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS, *Plaintiffs-Appellees,* No. 89-2809 vs. GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG, *Defendants-Appellants.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 89-304-C James E. Noland, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by the defendants-appellants, no judge in regular active service has requested a vote on the suggestion for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS,
Plaintiffs

vs.

GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG,
Defendants.

CAUSE NO. IP 89-304-C

MEMORANDUM OF DECISION AND ORDER

Summary of Decision

In this case the Court is asked to decide the right of possession as between the plaintiffs, the Autocephalous Greek-Orthodox Church of Cyprus ("Church of Cyprus") and the Republic of Cyprus, and the defendants, Peg Goldberg ("Goldberg") and Goldberg & Feldman Fine Arts, Inc., of four Byzantine mosaics created in the early sixth century. The mosaics, made of small chips of colored glass, were originally affixed to and for centuries remained in a church in Cyprus, a small island in the Mediterranean. In 1974, Turkish military forces invaded Cyprus and seized control of northern Cyprus, including the region where the church is located. At some point in the latter 1970s, during the Turkish military occupation of northern Cyprus, the mosaics were removed from their hallowed sanctuary. The plaintiffs claim that the Church of Cyprus has never intended to relinquish ownership of the mosaics, that the mosaics were improperly removed without the authorization of the Church or the Republic of Cyprus, and that the mosaics should be returned to the Church. The defendants, on the other hand, claim that export of

the mosaics was authorized by Turkish Cypriot officials, and that in any event Goldberg should be awarded the mosaics because she purchased them in good faith and without information or reasonable notice that they were stolen. Having heard and reviewed all the evidence in the case, the Court concludes that possession of the mosaics must be awarded to the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus.

The Court concludes that because the place where the mosaics were purchased, Switzerland, has an insignificant relationship to this suit, and because Indiana has greater contacts and a more significant relationship to this suit, the substantive law of the state of Indiana should apply to this case. Under Indiana law, a thief obtains no title to or right to possession of stolen items. Therefore, a thief cannot pass any right of ownership of stolen items to subsequent purchasers. Because the mosaics were stolen from the rightful owner, the Church of Cyprus, Goldberg never obtained title to or right to possession of the mosaics. Under this analysis of Indiana law, it is unnecessary to consider whether Goldberg exercised good faith or due diligence in obtaining possession of the mosaics

In the alternative, the Court considers the issues under Swiss law. Under Swiss law, in certain situations a thief may sell and pass good title to stolen items to a good faith purchaser. Whether one qualifies as a good faith purchaser is determined by evaluating certain factors. These factors are evaluated to determine whether the purchaser knew that the seller lacked title, or whether an honest and careful purchaser would have had doubts with respect to the seller's capacity to transfer property rights, and if so, then whether the purchaser reasonably inquired about the seller's ability to pass good title. Evaluating those factors under the facts of this case, the Court concludes that Goldberg is not a good faith purchaser under Swiss law. This is so because suspicious circumstances surrounded the sale of the mosaics which should have caused an honest and reasonably prudent purchaser in Goldberg's position to doubt whether the seller had the capacity to convey property rights, and because she had failed to conduct a reasonable inquiry to resolve that doubt.

Therefore, principally under Indiana law and alternatively under Swiss law, Goldberg never obtained good title to or the right to possession of the mosaics. The Church of Cyprus, the original and rightful owner of the mosaics, has requested and made a proper showing for the return of the mosaics. The mosaics are unique. The paramount significance of their existence is as part of the religious, artistic, and cultural heritage of the Church and the government of Cyprus, and as part of the national unity of the Republic of Cyprus. Therefore, the Court orders that possession of the mosaics is awarded to the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus.

Memorandum of Decision

Trial of this action was to the Court on May 30 through June 6, 1989. This Memorandum of Decision is entered in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, which allows findings of fact and conclusions of law to appear in a memorandum of decision filed by the court.

I. Procedural History

The plaintiffs filed their complaint in this suit on March 29, 1989. On March 31, 1989, the parties entered into an "Agreed Order," which was approved and signed by this Court on that same date. Pursuant to the terms of the Agreed Order, the plaintiffs posted a security bond in the amount of $150,000, and the defendants in turn agreed not to take any "action to alter, destroy, sell, or transfer possession of the four Kanakaria mosaics" identified in the plaintiffs' complaint. In their Agreed Order, the parties also agreed to a trial date of May 30, 1989. The defendants filed their answer on April 19, 1989.

On May 24, 1989, the Turkish Republic of Northern Cyprus ("TRNC") filed a "Motion to Intervene as Plaintiff." A hearing on TRNC's motion to intervene was held by this Court on May 30, 1989. By order dated May 30, 1989, this Court denied TRNC's motion to intervene and also denied TRNC's motion to stay the trial (which was scheduled to start that same day) pending appeal of the denial to intervene.

Before trial the issue of money damages was separated from this case. Thus, the only issue presently before the Court is who is entitled to possession of the mosaics.

From May 30, 1989, through June 6, 1989, a bench trial was held by this Court. The parties agreed to submit post trial briefs in lieu of closing arguments; those briefs were filed with this Court on July 11, 1989. Finally, by joint stipulation dated June 27, 1989, the parties agreed to extend the March 31st Agreed Order until August 15, 1989.

II. Jurisdiction

This Court has original jurisdiction over the subject matter of this action based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a). Plaintiff the Republic of Cyprus is a sovereign nation located on the island of Cyprus in the Mediterranean Sea.[1] Plaintiff Autocephalous Greek-Orthodox Church of Cyprus is a religious organization with its principal offices in Nicosia, Cyprus. Defendant Goldberg & Feldman Fine Arts, Inc. is a corporation organized and existing under the laws of the state of Indiana, with its principal place of business in Carmel, Indiana. Defendant Peg Goldberg is a citizen of the state of Indiana The amount in controversy in this case exceeds the sum of $10,000, exclusive of interest and costs.

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[1] The Court notes that the defendants have raised the issue of whether plaintiff the Republic of Cyprus has standing to maintain this suit. In the complaint, the plaintiff Republic of Cyprus alleges that the Republic and its citizens "have a recognized and legally cognizable interest in the four Kanakaria mosaics, and in protecting and preserving them as invaluable expressions of the cultural, religious and artistic heritage of Cyprus." Complaint, § 40. Without extended discussion, the Court concludes that plaintiff the Republic of Cyprus has a legally cognizable interest in the mosaics sufficient to confer standing. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S. Ct. 2405 (1973).

Both the Republic and the Church of Cyprus request that the mosaics be returned to the Church of Cyprus. The Court has concluded that the Church of Cyprus is entitled to possession of the mosaics. The Court need not address further the Republic of Cyprus's standing.

Venue is proper in the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C. § 1391(a).

III. Historical Setting and Factual Background

The facts established by the evidence presented are as follows.

A. The Mosaics of the Church of the Panagia Kanakaria

This case involves a dispute as to the ownership of four Byzantine mosaics. These four mosaics were originally part of a larger mosaic ("the original mosaic"). The original mosaic was affixed to the apse of the Church of the Panagia Kanakaria ("Kanakaria Church") in the village of Lythrankomi, Cyprus, in 530 A.D. Except for a unique quirk of fate, the original mosaic would have ceased to exist a thousand or more years ago. During the period of Iconoclasm (roughly the 8th century), government edicts mandated the destruction of religious artifacts so that such religious "images" would not be the subject of veneration. These iconoclast edicts were responsible for the destruction of many significant religious artifacts. The original Kanakaria mosaic is one of only six or seven Byzantine mosaics to survive the ravages of Iconoclasm and the passage of time.

The original Kanakaria mosaic depicted Jesus as a young boy seated in the lap of his mother, the Virgin Mary, who sat on a throne surrounded by a mandorla of light. The figures of Jesus and the Virgin Mary were bordered on each side by depictions of two archangels. This central composition was in turn bordered by a frieze containing the busts of the twelve apostles. The original mosaic was made of small pieces of colored glass referred to in the art world as tesserae.

As stated previously, the original mosaic was affixed to the apse of the Kanakaria Church in the early sixth century. Over the centuries, the mosaic has deteriorated. By 1960, all that remained of the original Kanakaria mosaic was the figure of Jesus, the bust of the North Archangel, and nine of the twelve apostles. Between 1959 and 1967, the mosaic was cleaned and restored under the sponsorship of the Department of Antiquities

of the Republic of Cyprus, the Church of Cyprus, and Harvard University's Dumbarton Oaks Center for Byzantine Studies. With the knowledge gained in its efforts to restore the mosaic, Dumbarton Oaks published an authoritative volume on the Kanakaria Church and its art: *The Church of the Panagia Kanakaria at Lythrankomi in Cyprus: Its Mosaics and Frescoes*, authored by A.H.S. Megaw and E.J.W. Hawkins (1977).

The four mosaics at issue in this case were once a part of the original Kanakaria mosaic. These four mosaics depict the figure of Jesus as a young boy and the busts of the North Archangel, the apostle Matthew, and the apostle James. Each of the four mosaics measures approximately two feet by two feet.

This brief background enables one to understand the origin of the four mosaics at issue in this case and their invaluable and irreplaceable significance to Cyprus's cultural, artistic, and religious heritage. Had it not been for an unusual series of events, these four mosaics would probably have remained in the Kanakaria Church to this day—undisturbed in their deteriorating but readily recognizable state.

B. The Partition of Cyprus

Cyprus is an island located in the Mediterranean The island covers 3,572 square miles and is smaller than the state of Connecticut. The population of Cyprus is approximately 696,000. The Cypriot population is comprised mainly of persons of either Greek or Turkish descent. Today, approximately 79 percent of the population is made up of persons of Greek descent, and approximately 18 percent of the population is made up of persons of Turkish descent. Historically, Greek Cypriots follow the Greek Orthodox faith; Turkish Cypriots follow the Muslim faith.

Cyprus was a British colony from 1878 to 1960, at which time it became an independent republic. In 1963, civil disturbances broke out between Greek Cypriots and Turkish Cypriots. United Nations peacekeeping forces were sent to Cyprus to restore order in 1964. The U.N. forces have remained in Cyprus ever since.

On July 20, 1974, Turkish military forces invaded Cyprus. Turkish troops landed on the north coast of Cyprus and advanced to Nicosia. By late August, the Turkish forces had extended their control over the northern 37 percent of the island. This region has remained under Turkish military occupation since the invasion.

After the invasion, the Turkish military established in essence a puppet government in northern Cyprus called the "Autonomous Cyprus Turkish Administration." That government was succeeded in February 1975 by the "Turkish Federated State of Cyprus." In 1983, the Turkish Federated State of Cyprus was succeeded by the "Turkish Republic of Northern Cyprus." The Turkish Republic of Northern Cyprus is recognized as a legitimate government by only one nation in the world: Turkey. It is not recognized, nor has it ever been recognized, by the United States government. The United States government recognizes only the plaintiff Republic of Cyprus as the legitimate government of all the people of Cyprus.

The Kanakaria Church is located in the village of Lythrankomi, which is in an area of northern Cyprus now under Turkish military occupation. After the 1974 invasion, the Greek Cypriot population of Lythrankomi was "enclaved" by Turkish military forces. During this time the Greek Cypriots were denied many basic human rights, including freedom of movement, medical care, and the ability to earn a living. Many men from the village were arrested and detained in Turkish jails; there they received severe beatings by Turkish soldiers.

Despite the hardships that fell on the Greek Cypriot parishioners of the Kanakaria Church, religious services continued to be conducted in that church on a regular basis. In July 1976, the pastor of the Kanakaria Church, Father Antomis Christopher, was forced to flee to non-occupied southern Cyprus for fear of his life. The church itself was not physically damaged between the invasion in July 1974 and Father Christopher's departure in July 1976. By the end of 1976, all Greek Cypriots in Lythrankomi had vacated the village and had relocated to southern Cyprus, which is controlled by the plaintiff Republic of Cyprus. Their departure from northern Cyprus was not voluntary.

C. The Theft of the Mosaics

Since the 1974 Turkish invasion, the government of the Republic of Cyprus and the Church of Cyprus have generally been denied access to occupied northern Cyprus. However, since that time they have received reports from persons in the occupied area that several churches and national monuments have been looted and destroyed and that many mosaics, frescoes, and icons in those churches and national monuments have been stolen or destroyed.[2] When Father Christopher fled occupied northern Cyprus in July 1976, the mosaics were still intact and affixed to

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[2] Cyprus is not alone in suffering great losses to its cultural property during times of war. During World War II, many nations suffered such losses. In response to the widespread theft and destruction of cultural property during World War II, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") convened an international conference at The Hague in 1954. The conference was held "for the purpose of drawing up and adopting a Convention for the Protection of Cultural Property in the Event of Armed Conflict" ("the Hague Convention"). *Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 1954.* The nations participating in the conference agreed "to take all possible steps to protect cultural property" because they were "convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind . . . that the preservation of cultural heritage is of great importance for all peoples of the world[,] and that it is important that this heritage should receive international protection." *Id.*

In the early 1970s, the Sixteenth General Conference of UNESCO adopted "The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" ("the UNESCO Convention"). To date, sixty-one nations have ratified the UNESCO Convention. In 1983, the United States ratified the UNESCO Convention with the passage of "The Convention on Cultural Property Implementation Act," 19 U.S.C. § 2601 *et seq.* *See also* Executive Order No. 12555 (1986). This act provides in part:

> No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter [January 12, 1983], or after the date of entry into force of the Convention for the Party State, whichever date is later, may be imported into the United States.

19 U.S.C. § 2607.

(Footnote continued on next page)

the apse of the Kanakaria Church. Sometime between August 1976 and October 1979, the interior of the Kanakaria Church was vandalized and the mosaics were forcibly removed from the apse of the church. The mosaics were severely damaged during their removal. Neither the Republic of Cyprus nor the Church of Cyprus has ever authorized the removal or sale of the Kanakaria mosaics.[3]

D. Cyprus's Efforts to Recover the Mosaics

As previously noted, since the Turkish invasion in 1974, the Republic of Cyprus has learned of the theft or destruction of much cultural property in Cyprus. Many churches, museums, and private collections have been looted, and other property has suffered destruction or loss. In some instances visitors who were allowed access to the occupied area would note such losses and report them to the Republic of Cyprus. It was through one such visitor that the Department of Antiquities first learned in November 1979 that the mosaics of the Kanakaria Church were missing. The Department is charged with the responsibility, among other things, of protecting church property which is either an antiquity or a national monument. The mosaics fall under this responsibility. Therefore, the Republic of Cyprus decided to seek recovery of the mosaics.

Immediately upon learning that the mosaics were missing, the Republic of Cyprus contacted UNESCO, informing it of the significance of the lost art and seeking its assistance. Thereafter,

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(Footnote continued from previous page)

The Hague Convention and the UNESCO Convention are not controlling in this case; however, they emphasize the importance that the United States and other countries have placed on restricting international trafficking in stolen art.

[3] While this action was pending, the Turkish Republic of Northern Cyprus ("TRNC") sought permission to intervene as a plaintiff for the purpose of recovering possession of the mosaics. By order dated May 30, 1989, this Court denied the TRNC's motion to intervene because that government is not recognized by the United States. As previously stated, the Kanakaria Church is located in an area controlled by the TRNC. The TRNC's efforts to intervene as a plaintiff in this case strongly indicate that it, too, never authorized the removal or sale of the Kanakaria mosaics.

the Republic of Cyprus notified several people and entities whom it believed could assist it in disseminating information about the missing mosaics and in recovering them. Cyprus continued to meet and discuss the situation with UNESCO officials in order to heighten awareness of Cyprus's loss of cultural property. Cyprus notified the International Council of Museums, an organization that coordinates and develops measures and security for museums throughout the world. It notified the International Council of Museums and Sites, an organization that works with restorers and specialists in the preservation of ancient monuments. The Republic of Cyprus introduced a resolution concerning the missing mosaics to Europa Nostra, a European organization interested in the conservation of the architectural heritage of Europe. The Republic of Cyprus sent the Europa Nostra resolution to the Council of Europe, which it believed would give wide publicity to the problem. Cyprus's ambassador and permanent delegate to the United Nations, Constantine Leventis, assisted in contacting these organizations. In addition, Ambassador Leventis spoke of the missing mosaics to individuals from museums, such as the British Museum and the Louvre, and to individuals from international auction houses, such as Christie's and Sotheby's.

The Republic of Cyprus also contacted both European and American museums about the missing mosaics. It contacted Harvard University's Dumbarton Oaks Institute for Byzantine Studies, considered to be the leading center in the United States for the study of Byzantine art. Dr. Vassos Karageorghis, Cyprus's Director of the Department of Antiquities from 1964 to 1989, and Anthanasios Papageorghiou, Curator of Ancient Monuments in Cyprus since 1962 and currently Acting Director of the Department of Antiquities, disseminated information about the missing mosaics to their colleagues and scholars throughout the world by sending letters and by addressing symposia, congresses, and other such meetings.

In addition, the Embassy of Cyprus in Washington, D.C. sent press releases and mailed information on a routine basis concerning the loss of Cyprus's cultural property in general and specifically the missing mosaics. Such information was disseminated to journalists, Members of Congress, legislative assistants

working in foreign affairs, and individuals in academia, archaeology, and in organizations who have expressed an interest in Greek and Cypriot affairs. The Embassy's mailing list contains several hundred names. The information sent out from the Embassy often included the speeches given around the world by Greek Cypriot officials asking for assistance in recovering the mosaics.

Throughout all these efforts, the Republic of Cyprus intended to disseminate the information that the mosaics were missing, to seek assistance from those in positions who might be able to aid Cyprus in its efforts, and to eventually recover lost or stolen cultural properties such as the mosaics. As a result of these efforts, the Republic of Cyprus has recovered some antiquities, including frescoes originally from a church in occupied northern Cyprus and other parts of the original Kanakaria mosaic. Additionally, as a result of these efforts, the Republic of Cyprus located the mosaics in this case.

E. The Mosaics Resurface

Goldberg is president and majority shareholder of Goldberg & Feldman Fine Arts, Inc. The co-owner of the company is George Feldman who serves as its vice president. Since becoming an art dealer in 1981, Goldberg has dealt almost exclusively in 19th and 20th century paintings, etchings, and sculptures. Goldberg is not, nor does she claim to be, an expert in Byzantine art.

On June 30, 1988, Goldberg flew to Amsterdam, The Netherlands, to inspect and possibly purchase for a client a painting by Amadeus Modigliani. The availability of a Modigliani painting for sale was brought to Goldberg's attention by Robert Fitzgerald, an art dealer from Indianapolis whom she "had known [ ] casually since 1980 or '81." Tr. 433. It was Fitzgerald who had located the purported Modigliani; he was to help facilitate the sale. In Amsterdam, Goldberg met Fitzgerald. Fitzgerald then took Goldberg to meet the owner of the painting. After inspecting the painting, Goldberg developed doubts "about being able to prove the authenticity of the painting." Tr. 438. At this point, the sale of the Modigliani painting fell through.

After the Modigliani sale fell through, Fitzgerald mentioned to Goldberg another deal. On July 1, 1988, Fitzgerald informed Goldberg that he was aware of four early Christian mosaics that were for sale. Later that day, Fitzgerald introduced Goldberg to Michel van Rijn, a Dutch art dealer, and Ronald Faulk, an attorney from California. Goldberg knew very little about van Rijn or Faulk. She was told, however, that van Rijn was once convicted in France for forging March Chagall's signature to prints of that artist's work and that he also had been sued by an art gallery "for failure to pay money." Tr. 539.[4] She was also aware that Faulk was in Europe to act as attorney for Fitzgerald and van Rijn.

At this July 1st meeting, van Rijn showed Goldberg photographs of the four Byzantine mosaics, and she immediately "fell in love" with them. Tr. 447. van Rijn told her that the seller requested $3 million for the four mosaics. She was also told that the seller was interested in selling the mosaics quickly because he "had recently become quite ill and had [a] cash problem." Tr. 457.

All of the information that Goldberg received regarding the mosaics and the seller came from Fitzgerald, van Rijn, or Faulk.[5] van Rijn told Goldberg that the seller of the mosaics was a Turkish antiquities dealer. In addition, he told her that the seller had "found" the mosaics in the rubble of an "extinct" church in northern Cyprus while serving as "an archaeologist from Turkey assigned to northern Cyprus." Tr. 456. According to van Rijn, the seller had been granted permission by Turkish Cypriot authorities to retain the mosaics and, in the late 1970s, to export them to Germany. Goldberg was not told the identity of the seller

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[4] Goldberg testified that van Rijn also told her that he was a descendant of Rembrandt on his father's side and of Rubins on his mother's side. Tr. 462. No other evidence supporting this claim was introduced, however.

[5] Fitzgerald testified at trial; a deposition of Faulk was admitted into evidence and has been reviewed by the Court; van Rijn, however, did not testify, nor was he deposed.

at the initial meeting on July 1st; however, two days later she was told that the seller was a man named Aydin Dikman.[4]

Previously, on June 28, 1988, Faulk went to meet with Dikman in Munich, Germany. Faulk was sent to meet with Dikman at the direction of his clients, van Rijn and Fitzgerald. It is interesting to note that Fitzgerald sent Faulk to meet with Dikman even before Fitzgerald mentioned the mosaics deal to Goldberg. In Munich, Faulk discussed a possible sale with Dikman, and Dikman gave him photographs of the mosaics.

At the July 1st meeting in Amsterdam, Goldberg knew that Faulk and Dikman had met earlier to discuss the sale of the mosaics. Goldberg asked Faulk to travel to Munich to inform the seller of her interest in purchasing the mosaics. At Goldberg's direction, Faulk met with Dikman on July 1st and 2nd. Faulk was shown documents that Dikman claimed were proof that the mosaics had been exported properly from northern Cyprus. Faulk returned to Amsterdam on July 2nd and reported to Goldberg that, in his opinion, the export documents appeared to be in order. At trial, the defendants offered Exhibits 702, 3015, and 3016, as support for their contention that Goldberg reasonably believed the mosaics had been properly exported. None of these documents, however, even mentions Dikman or the four mosaics at issue in this case.

For example, exhibit 702 is a sales invoice from a "Goklaney's Cash & Co." to an individual named Helga Bechly. The invoice refers to five floor mosaics, not the four wall mosaics at issue in this case. The Court is at a loss to understand how this sales invoice substantiates the defendants' contentions that Dikman found the mosaics in the rubble of an extinct church, and that Turkish Cypriot officials authorized the export of the mosaics.

On July 3, 1988, while still in Amsterdam, Goldberg negotiated an agreement with van Rijn, Fitzgerald, and Faulk, whereby "the parties agree[d] to acquire the mosaics for their

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[4] In the record, the seller's surname is spelled as "Dikman," "Dikmen," and "Diekman." Throughout this memorandum entry, the Court will refer to the seller as "Dikman."

purchase price of $1.080.000 (U.S.)." Exhibit 700. The agreement also provided that the parties would split the profits made on any future resale of the mosaics as follows: Goldberg & Feldman 50%; Fitzgerald 22.5%; van Rijn 22.5%; and Faulk 5%. *Id.* This agreement was executed on July 4th in Amsterdam. *Id.*

Later, Goldberg and Fitzgerald traveled to Geneva, Switzerland, to investigate a lead on a second possible Modigliani and to examine the mosaics. On July 5th, Faulk and Dikman transported the mosaics by airplane from Munich to Geneva. The mosaics were stored in crates in the free port area of the Geneva airport. The mosaics never passed through Swiss Customs.

After arriving in Geneva, Faulk and Dikman met Goldberg in the free port area of the airport. This was the only time that Goldberg met Dikman. Dikman introduced himself to Goldberg and then left. In the presence of Faulk, Goldberg then inspected the four mosaics. Upon seeing the mosaics, she "was in awe" and wanted to buy them "more than ever." Tr. 486. She was concerned, however, about their deteriorating condition.

Goldberg testified that while she was in Geneva she inquired as to whether the mosaics had been reported as stolen or missing and whether any applicable treaties might prevent the mosaics from being imported into the United States. She testified that she contacted, by telephone, the International Foundation for Art Research ("IFAR") in New York and UNESCO's office in Geneva. In addition, Goldberg claims she telephoned customs offices in the United States, Germany, Switzerland, and Turkey.

F. Goldberg Secures Financing

Goldberg has done business with Merchants National Bank of Indianapolis ("Merchants") for about five years. Her principal contact at the bank is Otto N. Frenzel III, Vice Chairman of Merchants National Bank & Trust Company of Indianapolis and Chairman of the Board of Merchants National Corporation. Goldberg and Frenzel have known each other for several years and have developed a good friendship. In addition, Frenzel and his wife have purchased art from Goldberg on several occasions,

and Merchants has requested Goldberg's assistance in evaluating whether to loan money for art purchases.

In Amsterdam, while contemplating the purchase of the Kanakaria mosaics, Goldberg knew she would have to borrow a substantial amount of money if she were to purchase the mosaics. She called Frenzel at his home to discuss possible financing from Merchants. Frenzel indicated that if Goldberg were certain about the propriety of purchasing the mosaics, he would attempt to arrange a loan for her. Frenzel referred her loan request to Timothy Massey, Vice President of the Professional Banking Department. Frenzel testified that he can recommend individuals for loans by volunteering to a loan officer his impressions of an individual's background, what he might know about a person, and what a person's expertise might be. Frenzel told Massey that Frenzel thought that Goldberg was a very bright individual with regard to art, that she was credible, and that she had a great deal of expertise. Frenzel also indicated to Massey that he, Frenzel, was comfortable with Goldberg.

Goldberg testified that she told Frenzel and Massey that the bill of sale of the mosaics to her would reflect a purchase price of $1.2 million. She further testified that she told Frenzel that out of this amount, she would either keep or receive back from the seller ten percent of the amount, or $120,000, to pay for her expenses, such as insurance, shipping, restoration, and operation of the business. Massey testified in his deposition that he understood the purchase price to be $1.2 million, and that he did not know at the time of the loan that she intended to keep ten percent of the loan. Frenzel testified in his deposition that he understood the purchase price to be $1.2 million.

After Goldberg arrived in Switzerland, Merchants agreed to loan her $1,224,000 for the purchase of the mosaics. Goldberg signed a business promissory note binding Goldberg & Feldman Fine Arts, Inc. as a corporation and herself individually on the loan. She also signed a security agreement offering the mosaics as security for the loan. Upon returning home to Indiana, Goldberg signed an additional agreement with Merchants, granting the bank five percent of the profits of the resale of the mosaics, not to exceed $175,000.

G. Goldberg Purchases the Mosaics

The sale and transfer of the mosaics was originally scheduled for July 5th; however, a delay in securing financing from Merchants prevented Goldberg from consummating the sale on that date. The $1.2 million from Merchants did not arrive at a bank in Geneva until July 7th. The $1.2 million was in $100 bills and was placed in two carrying bags. Of the $1.2 million, Goldberg kept $120,000 in cash, and gave the remaining $1,080,000 to Faulk and Fitzgerald for the purchase of the mosaics.

Goldberg testified that she did not know how the $1,080,000 was to be divided among the seller and the middlemen. She testified that she thought the middlemen would receive a small amount as commission, such as $80,000. However, the remaining $1,080,000 was actually divided as follows:

—$350,00 to Dikman as payment for the mosaics;

—$282,500 to van Rijn as a commission;

—$297,500 to Fitzgerald as a commission;

—$70,000 to an attorney in London;

—$80,000 to Faulk for legal fees and/or assistance in facilitating the sale.

Tr. 318-20. Upon completion of the sale on July 7th, Dikman issued a "General bill of sale" to Goldberg & Feldman Fine Arts, Inc. Exhibit 9. The bill of sale lists $1.2 million as the price Goldberg paid for the mosaics. *Id.*

On July 8, 1988, Goldberg returned with the mosaics to the United States. Goldberg insured the mosaics for $1.2 million and declared their value at U.S. Customs to be $1.2 million. As previously noted, Goldberg paid $1.08 million for the mosaics.

H. Significant Events in Indiana

Goldberg returned to Indiana with the four mosaics and with approximately $70,000 of the $120,000 she kept from the Merchants loan. In Europe she spent approximately $50,000 on conversion charges, shipping and insurance, and the purchase of four paintings and a small piece of art in The Netherlands. Goldberg testified that she deposited the remaining $70,000 in several of her bank accounts in Indiana. Exhibits 2201 through 2209 show a series of deposits, each under $10,000, in various business or personal accounts of Goldberg. At some point after Goldberg returned to Indiana with the mosaics, Frenzel and another Indiana resident, Dr. Stewart Bick, acquired interests in the resale profits of the mosaics.

Frenzel personally loaned Goldberg $25,000 in an unrelated art transaction. Frenzel stated in his deposition that the terms of the loan were ten percent interest and a two percent interest in the resale profits of the mosaics.

Additionally, at some point after Goldberg's return to Indiana, Dr. Bick and Frenzel together acquired an interest in the resale profits of the mosaics. Fitzgerald testified that he and van Rijn each sold half of their interest in the resale profits to Dr. Bick. Dr. Bick gave them $780,000 for such interests. Fitzgerald received $375,000 for his half of his interest As van Rijn and Fitzgerald each originally owned 22½ percent of the resale profits, this sale of interests to Dr. Bick gave him a 22½ percent interest in the resale profits, and left van Rijn and Fitzgerald with a 22½ percent interest. Of this percentage, Dr. Bick sold an eight percent interest to Frenzel for $390,000. Frenzel testified that he gave $390,000 of his own money to Dr. Bick and acquired the additional eight percent interest. This, when combined with Frenzel's two percent noted earlier, provides Frenzel with a total of ten percent interest in the resale profits. Massey testified in his deposition that Merchants loaned Dr. Bick $390,000. It was Massey's understanding that, with Dr. Bick's borrowed $390,000 and with Frenzel's personal $390,000, Dr. Bick and Frenzel purchased and owned an interest in the resale profits of the mosaics.

Goldberg intended to sell the mosaics. Beginning in the fall of 1988, she contacted at least two people in an attempt to market and sell the mosaics. By October 1988 Goldberg had discussed the sale of the mosaics with Dr. Geza von Habsburg, an art dealer operating out of Geneva and New York. In October of 1988 von Habsburg contacted Dr. Marion True of the Getty Museum in California and discussed whether the Getty would be interested in purchasing the mosaics. Dr. True explained that the Getty does not collect Byzantine art and told von Habsburg that, because of her close working relationship with Cyprus, it would be necessary for her to contact her friend Dr. Vassos Karageorghis about the mosaics. Dr. True had developed a working relationship with Dr. Karageorghis, and he had often spoken to her of Cyprus's attempts to recover the mosaics. Dr. True then called Dr. Karageorghis, who told her that export of the mosaics was not authorized by Cyprus and that the mosaics she described were the mosaics which Cyprus had been so interested in recovering. Dr. True gave Dr. Karageorghis the name of Geza von Habsburg and how to contact him.

In November 1988, Dr. Karageorghis and Papageorghiou, in conjunction with Cyprus's Director General of the Ministry of Foreign Affairs, contacted the Ambassador of Cyprus in Washington, D.C. They informed the Ambassador of the mosaics' existence in the United States and suggested that immediate and discreet action be taken to recover the mosaics. The embassy then began working with its attorneys, the plaintiffs' Washington law firm in this case, to determine the location and possessor of the mosaics. Embassy officials worked discreetly so as not to put the mosaics in any danger or cause them to disappear underground again.

By January 1989, Goldberg had also contacted her friend and art mentor Barbara Divver, who is an art dealer in New York. Divver contacted her friend John Walsh, Director of the Getty Museum, about the Getty's possible acquisition of the mosaics. Goldberg and Divver had agreed that if the Getty Museum eventually purchased the mosaics, Goldberg would give Divver a ten percent commission. Walsh directed that Dr. True, because she was more familiar with Cyprus's situation regarding

the mosaics, respond to Divver's inquiry. Dr. True spoke with Divver and explained to her substantially the same things she had discussed with von Habsburg. Dr. True told Divver that Dr. True would report this contact to the plaintiffs' Washington law firm and to U.S. Customs, which she did.

The plaintiffs and their attorneys eventually learned that the mosaics were in Goldberg's possession in Indianapolis. The plaintiffs wrote to Goldberg requesting the return of the mosaics. Upon the defendants' refusal, the plaintiffs instructed their attorneys to file suit to recover the mosaics.

Throughout this opinion, the Court will discuss such additional facts as may be necessary to support the determinations reached herein.

IV. Statute of Limitations

A federal district court sitting in diversity must follow state statutes of limitations. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). Moreover, a federal district court sitting in diversity must follow the choice-of-law rules of the state in which it sits. *Klaxon v. Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941). Because in Indiana statutes of limitations are procedural in nature, Indiana choice-of-law rules state that the statute of limitations of the forum state, Indiana, will apply. *Albrecht v. Indiana Harbor Belt Railroad Co.*, 178 F.2d 577 (7th Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S.Ct. 804 (1950); *Dart Industries, Inc. v. Adell Plastics, Inc.*, 517 F. Supp. 9 (S.D. Ind. 1980); *Horvath v. Davidson*, 264 N.E.2d 328 (Ind. App. 1970).

The Indiana code provides in relevant part:

> The following actions shall be commenced within six [6] years after the cause of action has accrued and not afterwards.
>
> * * * *
>
> Third. For injuries to property other than personal property, damages for any detention thereof, and for recovering possession of personal property.

I.C. § 34-1-2-1 (Burns 1986). Particularly in light of the plaintiffs' claim that the mosaics should be returned to the Church of Cyprus, the Court concludes that the Indiana statute of limitations providing specifically "for recovering possession of personal property" governs the issue of possession of the mosaics. Therefore, the plaintiffs' action is governed by a six-year statute of limitations.

Sometime between August 1976, when military force and threat of harm had forced church officials to leave the church involuntarily, and November 1979, the mosaics were removed from the Kanakaria Church. In November 1979 church and government officials first learned that the mosaics were missing from the Kanakaria Church. Goldberg acquired the mosaics in July 1988. The plaintiffs first learned that the mosaics were in Goldberg's possession in late 1988. The plaintiffs filed this action against Goldberg in March 1989. The defendants argue that the plaintiffs' cause of action first accrued in 1979 and that, because the complaint was not filed within six years thereof, plaintiffs' cause of action is barred. The plaintiffs, however, argue that under the circumstances of this case, they are not barred from recovering the mosaics. Thus the issue is whether the plaintiffs have filed their complaint in a timely fashion.

A. Policy

The courts reflect a strong policy in favor of statutes of limitations. The Indiana supreme court has stated:

> Formerly, statutes of limitations were looked upon with disfavor in that they are invariably in derogation of the common law. "Now, however, the judicial attitude is in favor of statutes of limitations, rather than otherwise, since they are considered as statutes of repose and as affording security against stale claims." . . . Such statutes rest upon sound public policy and tend to the peace and welfare of society and are deemed wholesome. . . . They are enacted upon the presumption that one having a well-founded claim will not delay in enforcing it.

Shideler v. Dwyer, 417 N.E.2d 281, 283 (Ind. 1981). Further, the Indiana court of appeals has ruled that "statutes of limitations are favored by the courts. . . . [t]hey are statutes of repose, founded upon a rule of necessity and convenience and the well-being of society." *Spoljanic v. Pangan*, 466 N.E.2d 37, 43 (Ind. App. 1984) (citations omitted). These cases indicate that Indiana follows the policies reflected in statutes of limitation. *Accord*, *O'Keeffe v. Snyder*, 416 A.2d 862, 868 ("The purpose of a statute of limitations is to 'stimulate to activity and punish negligence' and 'promote repose by giving security and stability to human affairs.' ") (*quoting Wood v. Carpenter*, 101 U.S. 135, 139; 25 L. Ed. 807, 808 (1879)).

B. Determination of the Timeliness and Accrual of a Cause of Action

The fact that statutes of limitations exist, however, does not mean that the timeliness of a claim is determined solely by the mechanical application of a period of months to a file-stamp date. Rather, under certain circumstances a court is required to evaluate the timeliness of a claim under rules and doctrines of law designed to ensure fairness and equity in the adjudication of claims. The facts of this case warrant that the Court evaluate the timeliness of the plaintiffs' claims under the following rules and doctrines.

First, the Indiana supreme court has held that the determination of when a cause accrues is the court's responsibility. *Burks v. Rushmore*, 534 N.E.2d 1101 (Ind. 1989). The applicable Indiana statute of limitations states that actions for the recovery of personal property "shall be commenced within six [6] years after the cause of action has accrued and not afterwards." I.C. § 34-1-2-1. Regarding the language "after the cause of action has accrued," the court has stated that "the legislature designated the reasonable time for bringing an action and left to the courts the responsibility of determining when the cause accrues." *Burks*, 534 N.E.2d at 1103 (citation omitted). *See also Barnes v. A.H. Robins Co., Inc.*, 476 N.E.2d 84, 85 (Ind. 1985) ("[i]t is clear this Court has the authority and responsibility to interpret the intentions of the legislature by deciding when a

cause of action accrues."). In *Burks, supra*, the Indiana supreme court reviewed the rules for determining when a cause of action accrues in Indiana. The *Burks* court noted that the general rule is that the statute of limitations begins to run when damage was ascertained or ascertainable by due diligence. 534 N.E.2d at 1104 (*citing Barnes*, 475 N.E.2d at 86). Thus, this Court notes that in Indiana the statute generally beings to run when damage was ascertained or by the use of due diligence could have been ascertained.

Second, Indiana recognizes a discovery rule as it may affect the running of a statute of limitations. In the *Barnes* case, *supra*, the Indiana supreme court, on a certified question from the Seventh Circuit, considered when a cause of action accrues when the injury to the plaintiff is caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance. The court held that "in those circumstances, a discovery type rule should be applied, and the statute of limitations in such causes commences to run from the date the plaintiff knew or should have discovered that [the plaintiff] suffered an injury or impingement, and that it was caused by the product or act of another." 476 N.E.2d at 87-88. *See also Burks*, 534 N.E.2d at 1103; *Walters v. Owens-Corning Fiberglass Corp.*, 781 F.2d 570, 572 (7th Cir. 1986). The court was careful to note that its adoption of the discovery rule in *Barnes* was limited to the specific circumstances before it, *i.e.*, injury as a result of protracted exposure to a foreign substance. The Court declined to adopt a discovery rule for all tort claims, stating "that would be going beyond the scope of the inquiry and put us in the position of issuing an advisory opinion." 476 N.E.2d at 87.

However, it is important for this Court to note the *Barnes* court's discussion of the discovery rule in general. In adopting a discovery rule in the case before it, the Indiana supreme court discussed the important policies supporting the discovery rule. The court stated:

> Many jurisdictions have responded to the problems presented by this type of case by adopting a "discovery rule." The discovery rule provides that the statute of limitations in this type of cause runs from the date the

> negligence was or should have been discovered. The rule is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring his cause of action in a limited period in which, even with due diligence, he could not be aware a cause of action exists.

476 N.E.2d at 86. Further, in support of its decision to adopt a discovery rule, the court observed that "[i]ncreasing numbers of jurisdictions are adopting some form of discovery rule," citing recent cases from 14 states. Finally, the court stated that it had discussed a discovery rule previously, in *Shideler, supra*. In that case the court noted "that in many cases where the discovery rule has been applied or alluded to, the misconduct was of a continuing nature or *concealed* . . ." 417 N.E.2d at 291 (emphasis added). The Indiana supreme court's adoption of the discovery rule in *Barnes* and its discussion of the policies and other jurisdictions supporting it indicate Indiana's willingness to extend the rule to other circumstances, if appropriate.

Third, Indiana recognizes the doctrine of fraudulent concealment as it may affect the running of a statute of limitations. Indiana has adopted the doctrine by case law and has reflected the doctrine in a statute.[7] The Indiana supreme court as stated:

> The harshness which may result from the application of a statute of limitations has been avoided by judicial recognition of certain exceptions. One of these exceptions is the doctrine of fraudulent concealment which operates as an equitable doctrine to estop a defendant from asserting a statute of limitations when he has, either by deception or by a violation of duty, concealed from the plaintiff

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[7] I.C. § 34-1-2-9 provides:

> If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action.

See also Walker v. Memering, 471 N.E.2d 1202, 1204 (Ind. App. 1984) (by statute, concealment may extend a statute of limitations).

> material facts thereby preventing the plaintiff from discovering a potential cause of action.

Burks, 534 N.E.2d at 1104 (citations omitted). The Indiana supreme court has also held that the doctrine of fraudulent concealment has its root in equity, and that in general the doctrine operates to disallow a defendant, who by deceit or fraud prevents a plaintiff from learning of a cause of action, from taking advantage of his own wrong by asserting the statute of limitations as a bar to the plaintiff's action. *Guy v. Schuldt*, 138 N.E.2d 891, 894 (Ind. 1956) ("While a wrongdoer is concealing from an injured person his wrongful act, the law will not, through a statute of limitations, strip the injured party of his remedy against the wrongdoer"). *See also Snyder v. Tell City Clinic*, 391 N.E.2d 623, 628 (Ind. App. 1979) (concealment of fraud tolls the statute of limitations) (*citing Guy v. Schuldt, supra*); *Brown v. Gardner*, 308 N.E.2d 424, 428 (Ind. App. 1974); *Ferrell v. Geisler*, 505 N.E.2d 137 (Ind. App. 1987) (doctrine of fraudulent concealment as applied in context of medical malpractice). To invoke the doctrine of fraudulent concealment, Indiana requires that the concealment be active and intentional, and that such concealment misleads or hinders the plaintiff's inquiry or ability to investigate. *Morgan v. Koch*, 419 F.2d 993, 998 (7th Cir. 1969); *Forth v. Forth*, 409 N.E.2d 641, 644-45 (Ind. App. 1980). *See also Lambert v. Stark*, 484 N.E.2d 630, 632 (Ind. App. 1985). For a plaintiff to invoke the doctrine of fraudulent concealment, Indiana requires that the plaintiff exercise due diligence to investigate the claim and attempt to discover the fraud. As the supreme court noted in *Guy v. Schuldt, supra*,

> If the fraud, although not discovered, ought to have been discovered, and could have been if reasonable diligence had been exercised by the plaintiff, the statute will run from the time discovery ought to have been made. To prevent the the barring of an action, it must appear that the fraud not only was not discovered, but could not have been discovered with reasonable diligence, until within the statutory period before the action was begun.

138 N.E.2d at 896 (citations omitted). *See also Morgan v. Koch, supra*, 419 F.2d at 999; *Tolen v. A.H. Robins Co.*, 570 F. Supp.

1146, 1151-52 (S.D. Ind. 1983); *Lambert*, 484 N.E.2d at 632; *Estate of Ballard v. Ballard*, 434 N.E.2d 136, 142 (Ind. App. 1982).

In addition to common law and statutory fraudulent concealment, Indiana courts have held that equitable estoppel will serve the same purpose and foreclose the use of a statute of limitations to a defendant who through fraud or misrepresentation prevents a plaintiff from commencing an action within the statute's original time frame. *See Donella v. Crady*, 185 N.E.2d 623, 625 (Ind. App. 1962); *Landers v. Evers*, 24 N.E.2d 796, 797 (Ind. App. en banc 1940). The requirement that the plaintiff exercise due diligence applies to fraudulent concealment grounded in equitable estoppel as well. *Spoljanic*, *supra*, 466 N.E.2d at 44-45. Further, one Indiana court has held that under equitable estoppel, "[a] defendant may be prevented from relying upon a statute of limitations by his own misrepresentations or fraud, even though he has not concealed the cause of action." *Marcum v. Richmond Auto Parts Co.*, 270 N.E.2d 884, 886 (Ind. App. 1971).

C. Application of Law to Case at Bar

The Court now applies the rules and principles developed above to the facts of this case. The Court notes that there is no Indiana case which controls the issue of when the statute of limitations begins to run and whether it has been tolled in an action for the replevin of stolen property such as valuable artwork. Therefore, it is this Court's responsibility to determine these issues as an Indiana court would. "The duty of a district court sitting in diversity faced with a novel [issue] . . . is to predict, as best as possible, how an [Indiana] court would decide the issue." *Walters*, *supra*, 781 F.2d at 572 (citation omitted). Although many of the Indiana cases discussing the timeliness of claims have been malpractice or products liability actions, the Court believes that Indiana has developed rules sufficient to allow this Court to apply them in the context of a replevin action for the recovery of stolen artwork. Under the facts of this case, the Court concludes that under Indiana law the plaintiffs' action is timely filed.

The Court holds that the plaintiffs' cause of action did not accrue in this case until the plaintiffs, using due diligence, knew or were on reasonable notice of the identity of the possessor of the mosaics. In this context a discovery rule should apply and prevent the statute from running until the plaintiffs knew or reasonably should have known who possessed the mosaics.

The court in *O'Keeffe v. Snyder, supra*, was faced with a similar issue. In that case the plaintiff Georgia O'Keeffe filed suit to replevy from the defendant three small pictures she had painted. She contended that the paintings were stolen. The defendant contended, *inter alia*, that the plaintiff's action was barred by a six-year statute of limitations. Plaintiff O'Keeffe claimed that the paintings were stolen in 1946. In 1976, O'Keeffe learned that her paintings were in the possession of the defendant. She filed suit for their return in 1976. In determining whether O'Keeffe's action was filed in a timely manner, the New Jersey supreme court reviewed its applications of the discovery rule. It noted that it had adopted the rule in the area of medical malpractice, and then extended it to other contexts. The court concluded that

> the discovery rule applies to an action for replevin of a painting . . . [the plaintiff's] cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.

416 A.2d at 870.

Similarly, this Court is persuaded that the discovery rule should apply to this case. The discovery rule prevents the statute from beginning to run in situations where a plaintiff, using due diligence, cannot bring suit because he is unable to determine a cause of action. In a replevin action, a plaintiff sues a defendant for the recovery of specific property. An element of the cause of action is the defendant's wrongful detaining or wrongful possession of the property sought to be recovered. In order to maintain a replevin action, the plaintiff must know who is in possession of the property at issue. If a plaintiff is unable to determine the

possessor of stolen items, the plaintiff cannot maintain a cause of action in replevin.

The Court concludes that a plaintiff who seeks protection under the discovery rule has a duty to use reasonable diligence to locate the stolen items. *See DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2823 (1988). Determination of due diligence is fact-sensitive and must be made on a case-by-case basis. *O'Keeffe*, 416 A.2d at 873. Having reviewed the facts of this case, the Court is persuaded that the plaintiffs exercised due diligence in their search to locate and to recover the mosaics.

From the time they first learned of the mosaics' disappearance, the Republic of Cyprus engaged in an organized and systematic effort to notify those who might assist them and to seek the return of the mosaics. As previously set out by the Court, Cyprus has contacted and worked with the United Nations, UNESCO, museums, museum organizations, leading Byzantine scholars and curators, and the press. Officials of the Republic of Cyprus have sent press releases and other information, delivered speeches, and made numerous personal contacts with individuals reasonably calculated to assist in recovery of the mosaics. Tr. 80-81, 90-101, 190-206, Leventis Deposition 21-45, True Deposition 25.

Dr. Marion True, Curator of Antiquities at the J. Paul Getty Museum in Los Angeles, testified that the Cypriots "had brought the loss of these mosaics to the attention of people who would have been more directly involved with Byzantine art." True Deposition 127. Cyprus's actions were designed to recover the mosaics at opportunities where the mosaics might be offered for sale. According to Dr. Gary Vikan, the plaintiffs' art expert and Assistant Director for Curatorial Affairs/Medieval Curator of the Walters Art Gallery in Baltimore, this strategy was "consistent with what is happening in the art world today, the goal is to stifle the trade at the point of destination." Tr. 388. Dr. Vikan further testified that, in his opinion, the Republic of Cyprus has been duly diligent in its attempts to recover lost cultural property, including the mosaics. Tr. 342, 382. In fact Dr. Vikan stated that in the Mediterranean, Cyprus "stands apart" in its

attempt to recover such property. Tr. 342. Dr. Vikan's testimony on this issue, as well as the testimony of the Greek Cypriot officials who were directly involved in these efforts, is credible and persuasive on this issue. The Court concludes that the plaintiffs have exercised due diligence in their search for the mosaics.

Further, the Court concludes that the plaintiffs did not know and were not reasonably on notice of the identity of the possessor of the mosaics until late 1988. The defendants argue that two incidents, an article in a Turkish publication and the recovery (assisted by the Menil Foundation) of frescoes and portions of the Kanakaria mosaic, should have put Cyprus on notice as to who was in possession of the mosaics at issue in this case. The Court disagrees.

A June 10, 1982 article in the Turkish publication *Ortam* contained the headline "Antique Smuggler, Aydin Dikmen, [sic] Allegedly to Deposit Money in the Bank Account of a Judge." Exhibit 2174. The article purported that Dikman was wanted for smuggling antique artifacts, that he was arrested and released shortly thereafter, and that Dikman's wife had allegedly deposited a large sum of money in the bank account of a judge. *Id.* The single paragraph of the article discussing Dikman linked him by implication to the theft of church icons from the Girne Castle museum. The majority of the article discussed the loss of cultural property from churches and museums in general on the island of Cyprus. The last section of the article discussed the mosaics missing from the Kanakaria Church. The article contained two pictures, each of portions of the Kanakaria mosaic. *Id.* Papageorghiou testified that the article did not make any connection between the mosaics and Aydin Dikman. Tr. 173. When Cyprus was made aware of Turkish press reports of missing Cypriot antiquities, it repeated its systematic steps of notification such as contacting UNESCO and sending out press releases. Tr. 193-94; Leventis Deposition 82. The Court concludes that Cyprus took reasonable steps upon learning of such information. The Court further concludes that nothing in the Turkish press did or reasonably should have put the Republic of Cyprus on notice that the mosaics were or could have been in Dikman's possession.

Similarly, Cyprus's recovery of frescoes and portions of the original Kanakaria mosaic in 1983 and 1984 with the assistance of the Menil Foundation in Texas did not and reasonably should not have put Cyprus on notice of who may have possessed additional portions of the mosaic. A series of events beginning in 1983 led to the recovery of the frescoes and portions of the mosaic. In 1983, London-based art dealer Yanni Petsopoulos contacted the Menil Foundation. de Menil Deposition 18. The Foundation has done business with Petsopoulos and employed him as a special agent for several years. Hopps Deposition 65. Petsopoulos had been approached by a man of Turkish nationality based in Germany (who, unbeknownst to any officials of the Republic of Cyprus turned out to be Aydin Dikman). Dikman asked Petsopoulos to help sell some frescoes in Dikman's possession. Leventis Deposition 47-48. Dikman represented that the frescoes were from Turkey. Hopps Deposition 73. Petsopoulos contacted the Menil Foundation about the possible purchase of the frescoes. Representatives of the Menil Foundation, including Walter Hopps, senior consultant, and Mrs. Dominique de Menil, president of the Foundation and widow of its founder, traveled with Petsopoulos to Germany to view the frescoes.

In Munich, they met Aydin Dikman, viewed the frescoes, and discussed their acquisition. *Id.* at 89 In Dikman's apartment they observed a mosaic. Hopps Deposition 68, 91; de Menil deposition 18. Later, Petsopoulos discussed with Hopps his suspicion that the mosaic was a part of the Kanakaria mosaic. Petsopoulos decided to research the matter. Petsopoulos's suspicion raised a question in Hopps's mind as to whether the frescoes were actually from Turkey, or whether they too could be from Cyprus. Hopps Deposition 114-15.

The Menil Foundation decided to purchase the frescoes. Hopps Deposition 98. It was determined that the frescoes were from Cyprus and that the mosaic seen in Dikman's apartment was part of the Kanakaria mosaic. Hopps Deposition 118, 125, 128-29. The Menil Foundation acquired the frescoes for the Church of Cyprus and reached an agreement which allowed the Menil to exhibit the frescoes for a period of time before returning them to Cyprus. de Menil Deposition 13, 32. Petsopoulos devised

a plan to recover the Kanakaria mosaic in Dikman's possession for the Republic of Cyprus.

Petsopoulos went to Dikman's villa in Turkey. Petsopoulos accused Dikman of lying to him and to the Menil Foundation about the origin of the frescoes. The meeting became "stormy" and there ensued an "enormous emotional explosion." Hopps Deposition 154-55. Petsopoulos proposed that to make up for having lied about the frescoes, Dikman should turn over what portions he possessed of the mosaic. Hopps Deposition 146-47. After an "emotional fracas," Dikman agreed and felt that the "honorable thing to do was to turn over what he had of the mosaics." Hopps Deposition 156. Petsopoulos arranged to effect transfer of the mosaics. Ambassador Leventis secured the recovery of four pieces of mosaic, two of which Cyprus determined were not genuine. Leventis Deposition 52-53. Dikman represented to Petsopoulos that he was returning all portions of the mosaic in his possession.

Throughout this series of events, officials of the Republic of Cyprus questioned Petsopoulos and Menil Foundation officials about who was in possession of the frescoes and mosaics, but no one would reveal such information. Leventis Deposition 48-49, 53; Tr. 207; Hopps Deposition 141-42, 163. Ambassador Leventis questioned on several occasions whether the individual from whom the mosaics were recovered possessed any additional pieces of the mosaic, and he was always told no. Leventis Deposition 51, 52, 54. Hopps himself did not believe that Dikman possessed any additional parts of the mosaic. Hopps Deposition 149.

Hopps and Petsopoulos did not tell Cypriot officials who had possessed the frescoes and mosaics because they feared reprisals against any remaining artwork or against the individuals or families of individuals who were involved in recovery. Hopps Deposition 150-53. Dr. Karageorghis stated that he understood this danger, having relayed at least one story of a violent reprisal in which the quarters of some individuals assisting Cyprus in recovering some antiquities were bombed. Hopps Deposition 152-53, 165, 187-89.

The Court concludes that throughout this series of events, the plaintiffs were not nor should they reasonably have been on notice of the possessor of the mosaics at issue in this case. The plaintiffs made diligent inquiries of those involved. However, the plaintiffs never learned of any identity or information sufficient to put them on notice of whom to investigate or of who possessed the mosaics. It was reasonable for both those involved in recovering antiquities for Cyprus and Greek Cypriot officials to fear reprisals against individuals or the art itself. It would be pointless and destructive to require the plaintiffs to have taken additional steps to investigate the recovery of its property if it was reasonable that such steps might result in physical harm or destruction to human life or the art itself. Cyprus concluded that no publicity should be given to the recovery of the mosaics at that time, believing publicity might affect United Nations' negotiations involving the sensitive, political division of Cyprus. Tr. 164.

The plaintiffs knew that the defendants were in possession of the mosaics late in 1988. The plaintiffs exercised due diligence but were unable to determine who possessed the mosaics until that time. Therefore, the plaintiffs' cause of action did not accrue until late 1988. The discovery rule prevents the statute from running until that time because the plaintiffs' cause of action did not accrue until they knew or were reasonably on notice of the identify of the possessor of the mosaics. *See O'Keeffe, supra.*[1] Accordingly, as the plaintiffs' complaint was filed in March of 1989, it is within the six-year statute of limitations and is timely filed.

Assuming, *arguendo*, that the discovery rule does not apply under the facts of this case, the Court concludes that the plaintiffs' action is timely filed under the doctrine of fraudulent concealment. There is support for the proposition that a cause of action for the replevin of property accrues at the time of the theft. The *O'Keeffe* court held that apart from the discovery rule, the statute of limitations in replevin actions "ordinarily will run against the owner of lost or stolen property from the time of the

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[1] *See also* 54 C.J.S. Limitations of Actions § 87 (discovery rule extended to situations in which equity and justice call for its applications).

wrongful taking. . . . " 416 A.2d at 872.[9] However the *O'Keeffe* court further stated that this was ordinarily true "absent fraud or concealment. Where the chattel is fraudulently concealed, the general rule is that the statute is tolled." *Id.* at 872-73 (citations omitted).[10] Assuming for purposes of discussion that the cause of action accrued in this case when the mosaics were stolen sometime between 1976 and 1979, the Court concludes that the doctrine of fraudulent concealment operates under the facts of this case to toll the six-year statute of limitations.[11]

The doctrine operates because the possessor and location of the mosaics were actively and fraudulently concealed from the plaintiffs. The fact that the mosaics were stolen and resurfaced in the art world after a period of approximately nine years indicates by its very nature that the mosaics were fraudulently concealed from the true owner, the Church of Cyprus. There is no evidence that the plaintiffs knew or reasonably should have known where the mosaics were from the time of the theft until 1988. As the court concluded above, nothing in a Turkish publication in 1982 did or reasonably should have put the plaintiffs on notice as to the possessor or location of the mosaics. Therefore, the doctrine of fraudulent concealment continued to run, uninterrupted. For purposes of this analysis it is sufficient to conclude that the doctrine tolled the running of the statute throughout 1983. As the plaintiffs' complaint was filed in March 1989 and the statute was tolled throughout 1983, the complaint was filed within the six-year limitation and is timely. For this reason it is unnecessary

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[9] *See also* 51 Am. Jur. 2d Limitation of Actions § 124 (general rule is that statute of limitations begins to run against owner of lost or stolen property at the time of wrongful possession); 79 A.L.R.3d 847, 851.

[10] *See also* 51 Am. Jur. 2d Limitation of Actions § 124, *supra* (in presence of fraud or concealment, statute of limitations does not run); 54 C.J.S. Limitations of Actions § 88 (general rule is that statute of limitations is tolled by fraud or concealment); 79 A.L.R.3d 847, 851, 856.

[11] The Indiana supreme court has previously noted that the doctrine of fraudulent concealment is applicable to many types of cases, including *inter alia* for the conversion of personal property and by an owner for the recovery of lost or stolen property. *Guy v. Schuldt*, 138 N.E.2d 891, 894-95 (Ind. 1956) (citations omitted).

for the Court to consider whether the doctrine tolled the statute beyond 1983.

To invoke the doctrine of fraudulent concealment, Indiana requires that the plaintiff exercise due diligence to investigate the claim and discover the fraud. *Guy v. Schuldt*, and cases cited, *supra*. Church officials and worshipers were forced to leave the Kanakaria Church and the village of Lythrankomi in 1976. Thereafter they have been prevented from exercising dominion over the Kanakaria Church. They experienced the threatened and actual destruction of their civilized existence and their physical safety. Because of these dangers, the plaintiffs' belief that they could not visit and worship in the church was reasonable. Thus, from the time the mosaics were stolen until the plaintiffs first learned of the theft in 1979, the Court concludes that the plaintiffs were reasonably unable to exercise due diligence because they were prevented from maintaining the Kanakaria Church and its property, including the mosaics. Once the plaintiffs learned of the theft of the mosaics, they exercised due diligence in searching for them. *See* discussion *supra* at pp. 40-42.

The plaintiffs have demonstrated that the doctrine of fraudulent concealment should operate in this case.[12] Because of the limitations period in this case is triggered by a specified event,

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[12] One Indiana appellate case has held that concealment of the identify of a party, as opposed to the concealment of a cause of action, does not support tolling of the statute under the doctrine of fraudulent concealment. *Landers v. Evers*, 24 N.E.2d 796 (Ind. App. en banc 1940). However, the Court concludes that this case is distinguishable from the case at bar.

In *Landers* the plaintiff was in an automobile accident. The defendant gave his name as "Harold" Evers instead of "Howard" Evers. The plaintiff sued the wrong person but did not learn this until the statute of limitations had run. In a suit against the correct defendant, plaintiff contended that the defendant fraudulently concealed his true identity from her and should be estopped from relying on the statute of limitations. The trial court disagreed and entered judgment for the defendant. The Indiana appellate court affirmed, holding that in Indiana statutory fraudulent concealment relates to the cause of action and not to the identity of the person against whom suit may be brought. 24 N.E.2d at 797.

(Footnote continued on next page)

i.e., the theft of the mosaics, *see Burks, supra*, 534 N.E.2d at 1105, the Court concludes that the statute of limitations was tolled by fraudulent concealment and equitable estoppel such that the plaintiffs filed their complaint in a timely manner. Because the Court has concluded that the plaintiffs were duly diligent and that their action is timely filed, it is unnecessary to address any of the defendants' other arguments, such as laches.

V. Choice-of-Law

A federal district court exercising diversity jurisdiction under 28 U.S.C. § 1332 must apply state substantive law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir. 1987). Moreover, a federal district court sitting in diversity must follow the choice-of-law rules of the state in which it sits to determine which state's substantive law to apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941); *DeValk*, 811 F.2d at 329. Therefore, this Court, exercising diversity jurisdiction over this suit, must apply the choice-of-law rules of the state in which it sits, namely, Indiana.

(Footnote continued from previous page)

However, the court went on to note that the plaintiff in *Landers* did not exercise due diligence. The court noted that the plaintiff "was in possession of the means to ascertain the proper person against whom to bring the action, if ordinary diligence had been exercised." *Id.* (citations omitted). Thus the court in that case did not decide that fraudulent concealment was inapplicable as much as it decided that the plaintiff had not exercised due diligence. The court refused to apply fraudulent concealment or equitable estoppel because the plaintiff in that case was not duly diligent.

In the case at bar this Court does not believe *Landers* forecloses this Court's determinations herein. As discussed above, the Court concludes that as long as the plaintiff is duly diligent, the inability to discover the possessor of the stolen mosaics invokes the doctrine of fraudulent concealment and tolls the running of the statute of limitations for replevin purposes.

A. Indiana Law Analysis

Indiana's traditional choice-of-law doctrine was *lex loci delicti commissi*, which dictated that the place where the wrong was committed governed which state's substantive law to apply. *Hubbard Mfg. Co., Inc. v. Greeson*, 515 N.E.2d 1071, 1073 (Ind. 1987). This traditional rule has been modified, however. In *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417 (Ind. 1945), the traditional *lex loci* rule was modified in the area of contract law. "The modified rule allowed the state with the most significant contacts to apply its substantive law even if the breach occurred in another state." *Hubbard*, 515 N.E.2d at 1073. Similarly, in *Hubbard, supra*, the Indiana supreme court modified the traditional rule in the area of tort law, and adopted the "most significant contacts" analysis in torts as well as in contracts. *Id.*; *see Consolidated Rail Corp. v. Allied Corp.*, 692 F. Supp. 924, 927 (N.D. Ind. 1988). Today, *Hubbard* is the leading case to discuss Indiana's choice-of-law rules.[13]

In *Hubbard*, the Indiana supreme court adopted a two-step analysis to be used in determining choice of substantive law. The first step is to consider whether the place of the wrong "bears little connection" to the legal action. 515 N.E.2d at 1073-74. If the contact is significant, then the Court must apply the substantive law of the state (or jurisdiction) where the wrong was

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[13] No Indiana case discusses choice-of-law rules in the context of a replevin action. However, *Hubbard* and *Barber* are significant in that they demonstrate the Indiana supreme court's modifications to Indiana's traditional *lex loci* rule. These modifications clearly indicate Indiana's shift to the most significant contacts analysis in choice-of-law determinations. *See also Restatement (Second) of Conflict of Laws* § 145 (most significant relationship analysis in torts); § 188 (most significant relationship analysis in contracts) (1971). Therefore, this Court believes that the analysis set forth in *Hubbard* provides the proper analytical framework for the choice-of-law issue presented in a replevin case such as this.

Further, the Court notes that conversion, a cause of action very similar to replevin, is a tort and therefore would fall under *Hubbard's* most significant contacts analysis for choice-of-law purposes. The fact that conversion would be analyzed under the most significant contacts approach is further support for this Court's decision to analyze this action for replevin under the most significant contacts approach as well.

committed. *Id.* The place where the wrong was committed in the present case is Switzerland; it was there that Goldberg took possession of and control over the mosaics. Switzerland "bears little connection" to the plaintiffs' cause of action. Neither the plaintiffs nor the defendants are citizens of Switzerland. None of the other individuals involved in the sale of the mosaics, namely, Dikman, Fitzgerald, van Rijn, or Faulk is a citizen of Switzerland. No Swiss citizen earned a profit on the sale of the mosaics, nor does any Swiss citizen own any interest in the mosaics.

Switzerland's lack of significant contacts is also highlighted by the fact that the mosaics never entered the Swiss stream of commerce. The mosaics were on Swiss soil no more than four days,[14] during which time they remained in the free port area of the Geneva airport. The mosaics never passed through Swiss customs.

The defendants stress the fact that the money used to finance the purchase of the mosaics passed from Merchants Bank in Indianapolis to Goldberg, *via* a Swiss bank. However, the Swiss bank did not loan Goldberg money, nor does it have any security interest in the transaction. The Swiss bank merely served as a conduit to pass the funds from Merchants in Indianapolis to Goldberg. Defendants also dwell on the fact that the sale was consummated in Switzerland while both the buyer and seller were in that country. However, most of the negotiations for the sale occurred in The Netherlands, not Switzerland. Any contacts Switzerland may have had to transaction at the heart of this suit were fortuitous and transitory. Switzerland has no significant interest in the application of its law to this suit. For the foregoing reasons, the Court concludes that Switzerland "bears little connection" to this suit; its contacts to this case are insignificant.

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[14] The mosaics were transported from Munich to Geneva on July 5, 1988, and from Geneva to Indianapolis on July 8, 1988.

After a court has determined that the place where the wrong was committed bears little connection to the legal action, the second step in the *Hubbard* analysis is to apply additional factors to determine which state or jurisdiction has the more significant relationship or contacts. *Hubbard*, 515 N.E.2d at 1074. Among the factors a court may consider are:

> (1) the place where the conduct causing the injury occurred;
>
> (2) the residence or place of business of the parties; and
>
> (3) the place where the relationship is centered.

Id. at 1073-74; *see also Gollnick v. Gollnick*, 517 N.E.2d 1257, 1058 (Ind. Ct. App. 1988). The Court concludes, after weighing these and other relevant factors, that Indiana has the most significant contacts to this suit. Therefore, Indiana law applies.

Indiana's contacts to this suit are more significant than those of any other jurisdiction. Defendant Peg Goldberg is a citizen of Indiana. Defendant Goldberg & Feldman Fine Arts, Inc. is an Indiana corporation with its principal place of business in Indiana. The purchase of the mosaics was effected largely through the efforts of an Indiana art dealer, Robert Fitzgerald. The purchase of the mosaics was financed by a loan obtained from an Indiana bank, Merchants; Merchants presently holds a security interest in the mosaics in the amount of $1,200,000. Several Indiana residents (Goldberg, Fitzgerald, Dr. Bick, Frenzel) and one Indiana corporation (Merchants) hold an interest in any profits realized on the resale of the mosaics. The original resale agreement among Goldberg, Fitzgerald, van Rijn, and Faulk stipulated that Indiana law would govern any disputes arising out of the agreement. This indicates Goldberg's belief that the laws of her home state, Indiana, were more significant to this transaction. Finally, the mosaics are presently in Indiana and have been in Indiana since they were transported from Geneva in July 1988. For these reasons, Indiana has a significant interest in the application of its law to this transaction. Therefore, the Court concludes that Indiana has the most significant contacts to this suit. Indiana law applies.

B. Swiss Law Analysis

The conclusion that Indiana substantive law applies in this case is bolstered by Swiss choice-of-law principles. As Professor Arthur von Mehren[13] testified at trial:

> The choice of law rules of another system may assist in certain cases a forum in determining its ultimate choice of the applicable law. . . . [I]t may be of interest to the forum and of help to the forum in reaching a conclusion to consider what view would be taken by the courts of another legal order if the matter were before those courts.

Tr. 9 (von Mehren). This Court will now examine Swiss choice-of-law principles for whatever light they may shed on the issue of which jurisdiction's substantive law should be applied under the facts of this case. Swiss choice-of-law rules also dictate that Indiana substantive law should control.

As a general rule, Swiss law applies the so-called *lex situs* principle in determining choice-of-law in cases where the ownership of tangible, movable property is disputed. *Id.* at 10. Under the *lex situs* rule, a forum court must apply the substantive law of the place where the tangible, movable property was physically located at the time of its sale. *Id.* If this general rule applies in the present case, then Swiss law governs because the mosaics were physically present in Switzerland when the sale was consummated. However, the general rule does not apply in this case.

Swiss law recognizes an exception to the general *lex situ* rule. As Professor von Mehren explained, under Swiss choice-of-law rules,

> an exception is made for situations in which the goods though physically present, have only a fortuitous and transitory or casual connection with the legal order in question. This

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[13] Arthur Taylor von Mehren is Story Professor of Law at Harvard Law School. Professor von Mehren testified at trial as an expert witness for the plaintiffs on the subject of Swiss law. In summarizing Swiss law, the Court will cite to the transcript of Professor von Mehren's testimony in lieu of citing directly to the Swiss statutes and treatises upon which Professor von Mehren based his conclusions. The Court is persuaded that Professor von Mehren's testimony is supported by applicable Swiss law.

> is often expressed as the exception for goods in transit.

Id. at 10, 11. If a transaction falls within this "in transit" exception, then the law of the situs does not apply; instead, the law of the place of destination applies.[6] *Id.* at 11. In the case *sub judice*, the place of destination is Indiana. Therefore, if the exception for property in transit applies, then Indiana substantive law governs.

The Court agrees with Professor von Mehren's opinion that the "in transit" exception applies in this case. Id. at 18. The mosaics were transported from Munich to Geneva. Upon their arrival in Geneva, the mosaics were placed in storage in the free port area of the Geneva airport; there they remained in storage for four days until being shipped to Indianapolis. The mosaics never passed through Swiss customs. The mosaics never entered the Swiss stream of commerce. Their presence in Switzerland was temporary, as was intended. Those involved with the transaction intended that if the sale were consummated, the mosaics were to be shipped to Indiana; if not, the mosaics were to be returned to Germany. For the foregoing reasons, the Court concludes that under Swiss law the "in transit" exception to the general *lex situs* rule would apply. Therefore the law of the place of destination controls, which in this case is Indiana. Accordingly, Swiss choice-of-law rules would agree with this Court's earlier conclusion that Indiana substantive law controls under the facts of this case.

VI. Substantive Law

A. Indiana Substantive Law

At every appropriate opportunity in their complaint, the plaintiffs request that possession of the mosaics be awarded to the plaintiff Church of Cyprus. Under Indiana law, replevin is the

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[6] Swiss law is unsettled in this area. The opinion that, under the "in transit" exception, the law of the place of destination controls is, according to Professor von Mehren, "[t]he prevailing rule today." Tr. 11 (von Mehren). Other authorities argue that the law of the place of origin would apply. The Court finds persuasive Professor von Mehren's conclusion that the law of the place of destination controls when the facts of a case fall within the "in transit" exception.

proper legal theory for the recovery of personal property. "A replevin action is a speedy statutory remedy designed to allow one to recover possession of property wrongfully held or detained as well as any damages incidental to the detention. The only issue *necessarily* decided in a replevin action is the right to present possession." *State Exchange Bank of Culver v. Teague*, 495 N.E.2d 262, 266 (Ind. App. 1986) (emphasis in original). Indiana courts have long adhered to this theory.[11] Although the mosaics were originally fixtures, attached to the apse of the Kanakaria Church, they may be replevied as long as their separate identities may be determined. A fixture severed from the

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[11] "[Our] courts have long held the primary purpose of a replevin action is to recover the rightful possession of the property." *Kegerreis v. Auto-Owners Insurance Co.*, 484 N.E.2d 976, 982 (Ind. App. 1985) (citations omitted). "Replevin is a possessory action, the gist or purpose of which is to determine the plaintiff's right to the possession of the property which is the object of the action and which the defendant has wrongfully taken or has wrongfully retained. . . . The primary object is to recover the possession of the property." *Ring v. Ring*, 174 N.E.2d 58, 61 (Ind. App. 1961) (citations omitted).

> Replevin is a possessory action. The purpose of an action in replevin is to determine who shall have possession of the property sought to be replevied. Even in causes like the cause at bar, where the plaintiff alleges that he is the owner of the property sought to be replevied and is entitled to the possession thereof, the purpose of the cause is to determine whether or not the plaintiff is entitled to the possession of the property, and it is not the purpose to determine whether the plaintiff is the owner of the property.

Meyer v. Deifenbach, 193 N.E. 693 (Ind. App. en banc 1935). "[T]he question of possession enters into and becomes the very gist of the action of replevin." *Beatty v. Miller*, 94 N.E. 897, 898 (Ind. App. 1911). "[I]n an action to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and damages for the detention." I.L.E. Replevin § 45 (West 1960).

The Court notes that Indiana provides a statutory process for replevin. *See* I.C. § 34-1-9.1-1 *et seq.* However, neither plaintiffs nor defendants have pleaded nor tried the case expressly under these provisions. The parties have tried the case with reference to causes of action for the recovery of personal property as found in Indiana case law. The Court finds it unnecessary to refer to the statutory provisions above in light of its disposition on the merits under Indiana case law.

real property to which it first attached becomes personal property and may be replevied. I.L.E. Fixtures § 14 (West 1959).[9]

The plaintiffs have requested the return of the mosaics. It is undisputed that the mosaics are significantly important to the Church and Republic of Cyprus. Papageorghiou testified that the mosaics have unique religious and spiritual significance to the Church and Republic of Cyprus. Tr. 84-85. Father Pavlos Maheriotis, Abbot of the Holy Monastery of Machaeras in Cyprus and a senior official and representative of the Archbishop of the Church of Cyprus, testified that the Church of Cyprus wants the mosaics returned because "they are our spiritual treasures. They were once put up on the wall and they were sanctified through the prayers and through the holy liturgy and they are part of our Christian life." Tr. 263. Dr. Vikan, the plaintiffs' art expert, testified that wall mosaics were the spiritual and artistic manifestation of the Byzantium culture. By lining the walls of sacred places with holy figures, the people of the Byzantine culture "create[d] a kind of sacred space for worship and veneration within that interior." Tr. 337-38. Dr. Vikan further testified that the original Kanakaria mosaic is of even greater significance because only six or seven mosaics survived both the ravages of iconoclasm, in which "images were outlawed and then they were consciously destroyed by imperial edict in Byzantium," and the passage of time. Tr. 338. Because the plaintiffs have requested the return of their uniquely valuable mosaics, the Court considers replevin as the more appropriate characterization of this case, including return of the mosaics as the more appropriate remedy. Therefore the Court will analyze the plaintiffs' claims under the elements of a cause of action for replevin.

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[9] For a general discussion of replevin and similar actions, such as claim and delivery, trover, trespass, detinue, and detention, *see generally* 77 C.J.S. Replevin, §§ 1-6 ("Replevin is a possessory action. The property is the subject of the action. The gist of the action is plaintiff's right to immediate possession and the defendant's wrongful taking or wrongful or unlawful detention." *Id.*, § 4; "In the choice of remedies, as between replevin and trover, or trespass, the preference is with the former, in that it restores the property itself." *Id.*, § 6); 66 Am. Jur. 2d Replevin, §§ 1-6.

In Indiana to prove a claim for replevin, a plaintiff must prove that he has title or right to ownership, that the property has been unlawfully detained, and that the defendant is in wrongful possession of the property. *Snyder v. International Harvester Credit Corp.*, 261 N.E.2d 71, 73 (Ind. App. 1970) (citations omitted); I.L.E. Replevin § 42 (West 1960). The Court now applies the elements of replevin to the facts of this case.

First, the plaintiffs must prove ownership of title or the right to possession of the mosaics. Indiana courts have held that "[i]n a replevin action it is fundamental that the plaintiff must prove his right to possession of the property. He must prove his right to possession on the strength of his own title, not merely the weakness of the defendant's title or right to possession." *Tucker v. Capital City Riggers*, 437 N.E.2d 1048, 1051 (Ind. App. 1982) (citations omitted).[9] Both Theodoros Avraam, a former resident of Lythrankomi, and Papageorghiou testified that the mosaics in this case are those from Kanakaria Church. Tr. 43, 53, 63-68, 82-83, 90. Father Maheriotis testified that the Kanakaria Church is part of the Church of Cyprus. Tr. 262. He identified a document, exhibit 2013, as a Certificate of Registration of Immovable Property by the Land Registry Office of Cyprus. He testified the the certificate indicates that the Kanakaria Church is a part of the Holy Archbishopric of the Church of Cyprus, which fact is duly noted by the seal of the church and the seal of the government. Tr. 262. In addition, Michael Kyprianou, senior counsel of the Republic of Cyprus in the Attorney General's office, testified that the mosaics, as property affixed to the Kanakaria Church, are owned by the Archbishop of the Church of Cyprus. Tr. 284, 302. The defendants presented no witnesses to contradict ownership of the mosaics by the Church of Cyprus.

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[9] *See also Hayes v. Harris*, 479 N.E.2d 1359, 1361 (Ind. App. 1985) (replevin action requires proof that defendant is in unlawful possession of plaintiff's personal property); *Aircraft Acceptance Corp. v. Jolly*, 230 N.E.2d 446, 449 (Ind. App. 1967) (general rule in replevin is that plaintiff must have either a general or special ownership with a right to possession of the property sued for at the time the action is commenced); *Williams v. Padelinetti*, 127 N.E. 158, 159 (Ind. App. 1920) (to recover in replevin plaintiff must prove that he was owner or entitled to possession of item and that defendant had wrongfully taken or detained item).

However, in questioning Kyprianou, defendants attempted to show that the Kanakaria Church is owned by a monastery. Even assuming this to be true, which the Court does not find as a fact, Kyprianou testified that the monastery is part of the Church of Cyprus as well. The Court concludes that the plaintiffs have presented credible and persuasive evidence that the right to ownership and possession of the mosaics rests with the plaintiff Church of Cyprus, for all times relevant to this litigation.

Second, the plaintiffs must show that the items to be replevied were unlawfully or wrongfully detained. The mosaics were removed from the Kanakaria Church at some point between 1976 and 1979, during the Turkish occupation of northern Cyprus. Father Maheriotis testified that the Church of Cyprus has never authorized anyone to remove the mosaics or to sell anything from the Kanakaria Church. Tr. 261-263. Further, Father Maheriotis testified that the Church of Cyprus does not consider the Kanakaria Church to be abandoned and that, when civil conditions allow, the Church of Cyprus intends to re-establish its congregation at the Church. Papageorghiou testified that the Republic of Cyprus never granted permission to anyone to remove or export the mosaics of the Kanakaria Church. Kyprianou testified that, under the facts of this case, the Church of Cyprus has never lost title to the mosaics even though the Church has not had physical control of the Kanakaria Church since the Turkish occupation of the region. Tr. 285. He further stated that the mosaics were removed and carried away without the consent of the Republic of Cyprus. Tr. 288-89. The defendants presented no credible evidence or persuasive argument that the mosaics were removed in a manner inconsistent with the above evidence.[20] The Court concludes the following: that the Church of Cyprus

[20] Through their evidence the defendants have attempted to show, *inter alia*, that the mosaics were properly exported and that such removal was authorized by Turkish Cypriot officials. The Court is not persuaded by these attempts. Parenthetically, the Court notes that the Turkish Republic of Northern Cyprus, in its memorandum in support of its motion to intervene in this case, claims that the mosaics are the property of the Turkish Republic of Northern Cyprus and that the mosaics were improperly removed from the church in violation of Turkish Cypriot laws. These assertions cast further doubt on the defendants' claim that export of the mosaics was authorized by Turkish Cypriot officials.

has never intended to relinquish title to or possession of the mosaics; that the Church of Cyprus has never abandoned the Kanakaria Church or the mosaics; and that the mosaics were improperly removed from the church, without the authorization or permission of the Church of Cyprus or the Republic of Cyprus. For purposes of this opinion, the mosaics were stolen from the church. For these reasons, the Court concludes that the mosaics were unlawfully detained or taken from the rightful possession of the Church of Cyprus.

Finally, to recover under replevin, the plaintiffs must prove that the defendants are in wrongful possession of the mosaics. The defendants concede that the mosaics are in their possession. Thus the issue is whether the defendants' possession of the mosaics is wrongful. As previously noted, the Court has concluded that the mosaics were stolen. There are long established rules of law in Indiana that a thief never obtains title to stolen items, and that one can pass no greater title than one has. *Torian v. McClure*, 83 Ind. 310 (1882); *Breckinridge v. McAfee*, 54 Ind. 141 (1876). Therefore, one who obtains stolen items from a thief never obtains title to or right to possession of the item. *Id.*

In *Breckinridge, supra*, one of the plaintiff's employees wrongfully and without the plaintiff's authorization took the plaintiff's wheat, sold it to defendants, and absconded with the money. The plaintiff sued for the return of the wheat, or if that was impossible, for money damages for the value thereof. At trial a jury returned a verdict for the plaintiff. The Indiana supreme court affirmed the judgment, holding as follows:

> In our opinion, a thief can not [sic] acquire any title to stolen property, by means of a larceny thereof, and can confer no title thereto on his vendees; and this is so, whether the larceny thereof is a larceny at common law, or a larceny thereof as larceny is defined in the modern English and American authorities.

54 Ind. at 149 (1876). This case clearly stands for the proposition, then, that a thief never acquires title to stolen property, and cannot pass any title to stolen property, and cannot pass any title to any subsequent transferees, including subsequent purchasers.

Similarly, in *Torian, supra*, the thief rented a piano from the plaintiff. The thief then sold the piano to the defendant, a good faith purchaser for value. The plaintiff sued the defendant in a replevin for the recovery of the piano. The trial court found for the plaintiff and ordered a return of the piano, or in the alternative money damages, and ordered money damages for the detention of the piano. The Indiana supreme court affirmed the judgment, including this conclusion of law:

> that [the thief], at the time he sold the piano, to the defendant, had no title thereto, and could confer none on the defendant, and that the plaintiff is the owner thereof.

83. Ind. at 311 (1882). This case as well stands for the proposition that a thief never acquires title to stolen property, and cannot pass any right to possession of stolen property to a subsequent transferee, including a *bona fide* purchaser for value.[21]

Under Indiana law, as outlined, a thief obtains no title to or right to possession of stolen items and can pass no title or right to possession to a subsequent purchaser. The mosaics were stolen. For purposes of this analysis, it is of no significance whether Aydin Dikman originally stole the mosaics, or who originally stole them. Further, it matters not whether Goldberg purchased the mosaics from Dikman alone, or from Dikman, van Rijn, and Fitzgerald, or from only van Rijn and Fitzgerald. The evidence of theft and chain of possession under the facts of this case lead only to the conclusion that Goldberg came into possession of stolen property. Under Indiana law, she never obtained any title or

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[21] *See also Shearer v. Evans*, 89 Ind. 400, 403 (1883) (thief cannot confer good title to stolen goods); I.L.E. Conversion § 15 (West 1958) ("If the original conversion was a theft, a purchaser from the thief can generally acquire no title, regardless of his innocence or good faith in making the purchase"). *Accord, O'Keeffe v. Snyder*, 416 A.2d 862, 867 (N.J. 1980); *Kunsammlungen Zu Weimar v. Elicofin*, 536 F. Supp. 829, 833 (E.D N.Y 1981), *affirmed*, 678 F.2d 1150 (2d Cir. 1982).

right to possession.[12] Therefore, this Court concludes that the defendants are in wrongful possession of the mosaics.

Under Indiana law, the Court concludes that the plaintiffs have made credible and persuasive showings on the elements necessary for the replevin of personal property.[13] The Indiana

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[12] As shown above, under Indiana law even a *bona fide* purchaser cannot acquire title to or right to possession of stolen property. Therefore, because the Court has concluded that the mosaics were stolen, there is no need to determine whether Goldberg was a *bona fide* purchaser under Indiana law.

The Court notes that in some situations a "middleman," for lack of a better term, may obtain voidable title and pass good title to a *bona fide* purchaser for value without notice of the original ownership. One who induces the original owner by fraudulent representations to sell an item acquires voidable title to the item from the middleman. Boyer, *Survey of the Law of Property*, 712-15 (1981). As between the original owner whose property is stolen and the *bona fide* purchaser who acquires the stolen item from a thief, the law will protect the original owners, because he did nothing and evidenced no intention to part with title to his property. As between an original owner who intentionally relinquished title to his property (albeit under fraudulent circumstances) and the *bona fide* purchaser from a fraudulent middleman, however, the law will protect the *bona fide* purchaser. The original owner lost his protection, ostensibly, when he parted with title to his property.

There is some indication that Indiana follows the voidable title rule. *Alexander v. Swackhamer*, 4 N.E. 433, 436 (Ind. 1886); *Breckinridge v. McAfee*, *supra*, 54 Ind. at 147. However, it is not necessary to apply this analysis to the facts of this case because there is absolutely no evidence that plaintiffs ever intended to part with title to or possession of the mosaics by sale, export, fraudulent relinquishment of title, or otherwise. As a matter of law no one in the chain of possession of the mosaics ever obtained voidable title; thus Goldberg could not be a *bona fide* purchaser under this analysis.

[13] At some points counsel have referred to this case in a conversion context. This Court notes that Indiana recognizes the tort of conversion. Indiana courts have held that the "essence of every conversion is the wrongful invasion of a right to, and absolute dominion over property owned or controlled by the person deprived thereof, or of its use and benefit . . . the essential elements to be proved are 'an immediate, unqualified right to possession resting on a superior claim of title'. . . . 'In actions for conversion, it is necessary for the plaintiff to show that before or at the time of the conversion, he had title, either general or special, to the property in controversy, coupled with the right of immediate possession, and that the property had been wrongfully converted by the defendant to his own use.'" *Noble v. Molstner*, 388 N.E.2d 620, 621 (Ind. App. 1979). *See also Indiana & Michigan Electric Co. v. Terre Haute Industries, Inc.*, 507 N.E.2d

(Footnote continued on next page)

cases holding that a thief obtains no title to stolen property recognize a long-standing rule. The cases establish law which increases in precedental value over time. As the plaintiffs have

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Footnote continued from previous page

588, 610 (Ind. App. 1987) (elements of conversion). The intent to convert one's property is not an essential element. *Howard Dodge & Sons v. Finn, supra*, 391 N.E.2d at 641. *Burras v. Canal Construction & Design Co.*, 470 N.E.2d 1362, 1368 (Ind. App. 1984).

The general rule in Indiana is that in an action for conversion, the owner does not seek return of the property, but only money damages for its value. *Plymouth Fertilizer Co., Inc. v. Palmer*, 488 N.E.2d 1129, 1130 (Ind. App. 1986), although one Indiana court has held that conversion is "cured" by the payment of damages or the return of the property. *Chesterton State Bank v. Coffey*, 454 N.E.2d 1233, 1237 (Ind. App. 1983). Further, in Indiana actions for conversion are governed by a two-year statute of limitations. *French v. Hikman Moving & Storage*, 400 N.E.2d 1384, 1388 (Ind. App. 1980) (citation omitted). One Indiana court has noted that a two-year statute of limitation for conversion is "an anomaly" when compared to the six-year statute of limitations which applies to an action to recover personal property. *Rush v. Leiter*, 271 N.E.2d 505, 508 (Ind. App. 1971).

The *Rush* court also noted that at common law the tort of conversion had two remedies, trover, which resulted in a forced judicial sale of the property, and replevin, which resulted in recovery of the specific items. 271 N.E.2d at 508. As this Court has previously stated, possession of the mosaics is the more appropriate remedy in this case, and replevin is the more appropriate characterization of the case.

The Court notes that the elements necessary to prove conversion are very similar if not identical to those necessary to prove an action for replevin. This Court believes that under Indiana law, the cause of action for replevin stands on its own, and proof of a conversion is not a predicate to recovery in replevin. However, to the extent it may be necessary to support the decision reached herein, the Court concludes that the plaintiffs have also proven the elements of a conversion. The plaintiffs' claim for conversion accrued when the defendants obtained possession of the mosaics in July, 1988, *see Lee Tool & Mould, Ltd. v. Fort Wayne Parts, Inc.*, 791 F.2d 605, 608-09 (7th Cir. 1986), and thus the plaintiffs' filing of their complaint in March 1989 was properly within the two-year statute of limitations for actions of conversion.

However, the Court states expressly that any rule or conclusion of law regarding conversion notwithstanding, the Court is of the firm belief that replevin and possession of the mosaics is the more appropriate characterization of and remedy for this case.

proven their case for replevin, the Court concludes that possession of the mosaics must be awarded to the plaintiff Church of Cyprus.

B. Swiss Substantive Law

Assuming, *arguendo*, that Indiana substantive law does not apply in this case, the Court next considers the issues under Swiss law. Under Swiss law, a purchaser of stolen property acquires title superior to that of the original owner only if he purchases the property in good faith. Tr. 19 (von Mehren). A bad faith purchaser of stolen property never acquires title. *Id.* at 20. As Professor von Mehren explained at trial, to conclude that a purchaser did not act in good faith, a court must *either* find that the purchaser actually knew that the seller lacked title, *or* find that "an honest and careful purchaser in the particular circumstances would have [had] doubts with respect to the capacity of the seller to transfer property rights." *Id.* at 24.

Swiss law presumes that a purchaser acts in good faith. *Id.* at 26. However, a plaintiff seeking to reclaim stolen property may overcome this presumption. *Id.* To do so he must show that suspicious circumstances surrounded the transaction which should have caused an honest and reasonably prudent purchaser to doubt the seller's capacity to convey property rights. *Id.* If the plaintiff shows that the circumstances surrounding the transaction should have created such doubt, then the defendant purchaser has the burden of establishing his good faith. A purchaser establishes his good faith by showing that he took steps to inquire into the seller's capacity to convey property rights and that such steps reasonably resolved such doubt. *Id.*

1. Suspicious Circumstances

As previously set forth, under Swiss law, this Court must begin its analysis by presuming that Goldberg purchased the mosaics in good faith. The plaintiffs argue that they have overcome this presumption by showing that suspicious circumstances surrounded the sale of the mosaics sufficient to cause an honest and reasonably prudent purchaser in Goldberg's position to doubt whether Dikman had the capacity to convey property rights. Therefore, plaintiffs contend, Goldberg cannot rest on the

presumption that she purchased the mosaics in good faith. The Court agrees.

Many suspicious circumstances surrounded the sale of the mosaics. First, Goldberg knew the mosaics came from an area occupied by foreign military forces. Goldberg testified that at the time of the sale she was aware that Turkish military forces had invaded Cyprus in 1974 and that the Turks have been in control of northern Cyprus since that time. Tr. 460. She was told by Michel van Rijn that the mosaics had been "found" by the seller in the rubble of an "extinct" church in northern Cyprus and that the church had been damaged during the Turkish invasion. Tr. 469-70. Goldberg herself admitted on direct examination that the origin of the mosaics raised suspicions in her mind:

> Q. I believe you said that Mr. van Rijn told you these mosaics were from Cyprus. Did that set off any warning bells in your mind?
>
> A. Well, yes. I mean, I knew that Cyprus had been a British colony for a number of years. I knew that the island had changed hands, or parts of it had changed hands many times, and I did know that at least for the last 14 or 15 years the island had been divided.

Tr. 459-60.

Second, the very nature of the items for sale warranted that a potential purchaser should proceed with caution. As Professor von Mehren explained:

> Here we have not an ordinary object, nor do we have an object that is typical movable property. Instead we have mosaics that are unique, that have great cultural and artistic value, that have also great economic value. These mosaics were, up until very recently, not movable property at all. They were part of a building. They were immovable property. When one has an object that was not movable property and it then is turned into movable property and appeared on the market and is of great and unique value, the circumstances require an explanation as to how that came

> about. Was this a legitimate series of events, or not?
>
> In addition, these objects are not ordinary commercial objects. They are objects that have religious and cultural significance. They are the kind of objects that do not ordinarily enter into commerce, and here they are in commerce, or being offered for sale. A careful and honest purchaser would have to understand and explain why. . .these mosaics should now be offered on the market.

Tr. 27-28 (von Mehren).

Third, a vast disparity existed between the appraised value of the mosaics and the price Goldberg paid for them. Goldberg paid $1.08 million, in cash, for the mosaics; six months later, she offered to sell them to the Getty Museum for $20 million.[24] Exhibit 52. Prior to her purchase of the mosaics, Goldberg received an appraisal of their value from van Rijn. He valued the mosaics at approximately $1.2 million for each of the three smaller pieces and approximately $2.4 million for the mosaic depicting Christ, or a total of $6 million for all four mosaics. Exhibit 43. Art dealer Robert Roozemond appraised the value of the mosaics at two million pounds, or approximately $4 million. Exhibit 44. Robert Fitzgerald, an art dealer with 28 years experience, valued the mosaics at $3 to $5 million. Tr. 316. The defendants' art expert, Andre Emmerich,[25] estimated the market value of the mosaics to be between $5 and $6 million. Emmerich Deposition 81.

Fourth, Goldberg knew very little about the seller, Aydin Dikman.[26] Everything she knew about Dikman she learned from middlemen: Fitzgerald, van Rijn, and Faulk. She was told that Dikman was a Moslem Turk attempting to sell Christian mosaics

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[24] Goldberg testified that, upon seeing photographs of the mosaics for the first time, she "fell in love" with them. Tr. 447. The fact that she quickly offered the mosaics for sale for $20 million discredits her prior testimony.

[25] Andre Emmerich is an art dealer and the owner of Andre Emmerich Gallery, Inc., New York, New York.

[26] Goldberg was not told the identity of the seller at her initial meeting with van Rijn and Fitzgerald on July 1, 1988. It was not until July 3rd that she was told the seller was a man named Aydin Dikman.

from northern Cyprus. She was also told that Dikman "found" the mosaics while he was employed as "an archaeologist from Turkey assigned to northern Cyprus." Tr. at 456. The Court believes that a reasonable purchaser would have found it peculiar that a Turkish archaeologist would be in the business of selling Cypriot antiquities. As the plaintiffs' art expert Dr. Vikan testified:

> the one thing that really strikes me about this as being strange is that he [Dikman] is an archaeologist. This is a good thing, I guess, but when in the world did archaeologists get in the business of selling antiquities? I mean this is bizarre.

Tr. 350. In addition, Goldberg met the seller, Dikman, only once.[7] That brief meeting occurred on July 5, 1988, or two days before the sale was consummated. This was the only time Goldberg and Dikman ever communicated directly with each other. Finally, as previously discussed, no document such as a bill of sale or export paper links *Dikman* to these mosaics.

Fifth, the cast of characters acting as middlemen, namely, Michel van Rijn, Ronald Faulk, and Robert Fitzgerald, were themselves suspect. Goldberg knew very little about Michel van Rijn; she first met him on July 1, 1988, or six days before the sale was consummated. She did know, however, that he was a felon.

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[7] Goldberg testified that on July 5, 1988, she met Faulk and Dikman in the free port area of the Geneva airport for the purpose of inspecting the mosaics. The meeting between Goldberg and Dikman was fleeting and proved uneventful, as described in the following excerpt from Goldberg's testimony at trial:

> Q. What did you say to him [Dikman] and what did he say to you?
>
> A. Well, that is about what it was. I had prepared a list of things that, if possible, to talk about. But I introduced myself and he introduced himself and we shook hands and the crates containing the mosaics were opened and he left.
>
> Q. Did you perceive that he was—whether or not he was fluent in English?
>
> A. I don't think so.

Tr. 484. Attorney Faulk does not remember this meeting between Goldberg and Dikman and is not sure whether they ever met in person. Faulk Deposition 228.

Goldberg testified that at the time of the sale she knew van Rijn had been convicted in France for art forgery. She also knew that van Rijn was being sued by an art gallery for "[f]ailure to pay money." Next, Goldberg knew very little about Ronald Faulk. She knew only that he was an attorney from California and that he was representing Fitzgerald and van Rijn in this transaction.[3] Goldberg was, however, familiar with Robert Fitzgerald, the principal middleman. She "had known him casually for several years." Tr. 533. She knew, for example, that in the past Fitzgerald had used the names Robert Jones, Robert Jones-Fitzgerald, and Robert Fitzgerald-Jones. Tr. 533. She also knew that Fitzgerald had been sued for his involvement in a transaction involving a purported Michelangelo modello. Tr. 323-24, 433-35. In addition, Goldberg knew that all three middlemen were to profit financially from the sale of the mosaics.

Finally, the haste with which the transaction was carried out raises suspicions. Goldberg first learned of the mosaics on July 1, 1988. On July 4th, she signed a contract with the three middlemen to divide the mosaics' resale profits. Later on July 4th Goldberg traveled from Amsterdam to Geneva. There she inspected the mosaics on July 5th. The sale was consummated on July 7th. On July 8th, the mosaics were on an airplane to the United States. The rush with which this sale took place raises suspicions. As Dr. Vikan testified:

> The timing of the sale [raises suspicions]. July 2nd [to] July 7th. What is the big hurry? These things have been in somebody's warehouse in Munich for ten years, nine years. Why such a hurry now? If you are in such a hurry why not put a good faith deposit down, why not put your funds in escrow, why not write a contract with the contingency this contract will go into effect on the 1st of September with the delivery of all funds contingent on the satisfactory resolution of provenance, authenticity, and restorability . . . .

Tr. 352.

[3] Attorney Faulk did not represent, nor claim to represent, Goldberg in this transaction.

All of the foregoing sets of circumstances, especially when considered together, raise significant suspicions. For these reasons, the Court concludes that suspicious circumstances surrounded this sale sufficient to cause an honest and reasonably prudent purchaser in Goldberg's position to doubt Dikman's capacity to convey property rights to the mosaics. The Court cannot improve on Dr. Vikan's summation of the suspicious circumstances surrounding this sale: "All the red flags are up, all the red lights are on, all the sirens are blaring." Tr. 353. Because such suspicious circumstances existed, Goldberg cannot rest on the presumption, which she is afforded under Swiss law, that she purchased the mosaics in good faith. Instead, Goldberg now bears the burden of establishing her good faith. She may do so by showing that she took steps to inquire into Dikman's capacity to convey property rights to the mosaics and that such steps reasonably resolved any doubts as to Dikman's capacity to convey such property rights.

2. Goldberg's Inquiry

Next, the Court will examine the steps Goldberg took to inquire into Dikman's capacity to convey property rights to the mosaics. As a prefatory matter, the Court notes that all of Goldberg's inquiries took place *after* July 4, 1988, which is the date she signed an agreement with the middlemen to split the profits from any future resale of the mosaics.

Goldberg testified that she telephoned authorities at UNESCO's office in Geneva. She cannot recall the name of any individual she spoke with at UNESCO, Switzerland. Goldberg testified that the purpose of her call was to determine "whether or not there were any applicable treaties which would have covered the removal of the items from northern Cyprus in the mid to late 1970s to Germany." Tr. 497. Thus, Goldberg inquired about treaties, not about the mosaics. She did not inquire as to whether the mosaics had been reported as stolen or whether existing claims might exist. In fact, she did not mention the mosaics at all. Further, Goldberg did not contact UNESCO's office in Paris, which is UNESCO's "central gathering point" for

information concerning art and cultural property. Emmerich Depo. at 73.

Goldberg also testified that she telephone the International Foundation for Art Research (IFAR) in New York. IFAR is an international organization that collects information concerning stolen art. Goldberg does not recall the name of any individual she spoke with at IFAR. No document sent to or received by IFAR confirms Goldberg's telephone call. IFAR has no record of Goldberg's alleged telephone call in July 1988. IFAR has a procedure whereby a formal search can be made of its files to determine whether a particular work of art has been listed as missing or stolen. Lowenthal Deposition 17. The cost is $25, which is billed to the requesting party. *Id.* Goldberg did not request that such a formal search be conducted, nor was she billed for any informal search IFAR may have conducted of its files in July 1988.

Next, Goldberg testified that she telephoned customs offices in the United States, Switzerland, Germany, and Turkey. She cannot recall, however, the name of any person she allegedly contacted at any of these customs offices. She testified that she asked whether the mosaics had been reported as missing or stolen. Tr. 493-97. Her testimony is not corroborated by a single document sent to or received from any such customs office. In addition, on December 18, 1988, Goldberg prepared "an outline" of "the steps that we [Goldberg and Feldman] took and the knowledge we had of the pieces." Tr. 567. No mention is made in this outline of any calls placed to or contacts made with U.S., Swiss, German, or Turkish Customs.

Next, the Court will examine briefly the steps Goldberg failed to take in determining whether Dikman had the capacity to transfer property rights to the mosaics. First, and most significantly, Goldberg never contacted the Republic of Cyprus or the Church of Cyprus, even though she was told the mosaics came from an "extinct" church in northern Cyprus. Contacting Cyprus is the first logical and necessary step a potential purchaser should have taken to determine the provenance of the

mosaics. The importance of contacting Cyprus was highlighted by Dr. Vikan during his direct examination:

> Q. Assuming that a prudent person did not want to walk away from this transaction, what, if anything, should that person have done to pursue the transaction?
>
> A. Call the Republic of Cyprus, the only thing you can do.
>
> Q. And why, in your view, is that the only thing you can do?
>
> A. Because the object is [from] there. I'll use the metaphor of the smelly fish. The smelly fish is lying in front of you and it ha[s] Cyprus written on [its] side. The only way you can lift that is to get in touch with the people who can tell you the truth.

Tr. 353.

Second, Goldberg never contacted the so-called Turkish Republic of Northern Cyprus, formerly known as the Turkish Federated State of Cyprus, even though she was told that the seller, Dikman, discovered the mosaics while he was working as "an archaeologist from Turkey assigned to northern Cyprus." Goldberg later refers to Dikman as "the official archaeologist for the northern one-third of Cyprus, known as the Turkish Federated Republic of Cyprus." Exhibit 12. By contacting the Turkish Republic of Northern Cyprus, Goldberg could have verified whether Dikman had ever served as the "official archaeologist" of that country and whether the mosaics had ever been exported properly from northern Cyrpus [sic].

Third, Goldberg failed to contact Interpol, the international police organization headquartered in France, to investigate whether the mosaics had been reported as stolen. In light of this, the defendants' point that plaintiffs failed to report the theft of the mosaics to Interpol is of little significance.

Finally, Goldberg did not consult a single disinterested expert on Byzantine art prior to purchasing the mosaics. Goldberg is not, nor does she claim to be, an expert in Byzantine

art. Rather, she deals almost exclusively in 19th and 20th century American and European paintings, etchings, and sculptures. Art dealer Barbara Divver suggested to Goldberg that she seek independent, expert advice from one familiar with Byzantine art, but Goldberg failed to do so. Even defendants' own art expert, Andre Emmerich, testified that an art dealer should secure expert advice before venturing into areas in which he is not expert. Emmerich Deposition 57-61.

As the foregoing discussions indicate, Goldberg made only a cursory inquiry into the suspicious circumstances surrounding the sale of the mosaics. Further, the Court has noted additional steps that Goldberg utterly failed to undertake. Therefore, the Court concludes that Goldberg's inquiry was deficient in resolving doubts as to Dikman's capacity to convey property rights to the mosaics.

In summary, the Court concludes that suspicious circumstances surrounded the sale of the mosaics which should have caused an honest and reasonably prudent purchaser to doubt whether Dikman had the capacity to convey property rights. Further, the Court concludes that Goldberg, in making only a cursory inquiry into Dikman's capacity to convey property rights to the mosaics, failed to take reasonable steps to resolve that doubt. Goldberg did not purchase the mosaics in good faith.

Conclusion

Regarding issues of credibility in this case, the Court finds that the evidence and testimony of the plaintiffs is more credible and persuasive. Indeed, in many instances the manner in which the defendants and associated individuals proceeded in this case reflects negatively on the credibility of the defendants' case.

As previously discussed, under Indiana law and in the alternative under Swiss law, defendant Goldberg never obtained good title to or any right to possession of the mosaics. The plaintiffs have made a proper showing in all respects for the return of the mosaics. The Court concludes that under the circumstances of this case, possession of the property at issue, and not money damages in lieu of return of the actual property, is the more

appropriate remedy. Accordingly, the Court orders that the mosaics must be returned to the true and rightful owner, the Church of Cyprus.

The Court notes that damages may be awarded for the loss of the use of the property in a replevin action. *Lou Leventhal Auto Co., Inc. v. Munns*, 328 N.E.2d 734 (Ind. App. 1975). Before trial, the issue of damages was separated from the issue of rightful possession of the mosaics. Issues of potential damages and other counts in the plaintiffs' complaint remain. For purposes of determining issues such as damages, remaining claims, and custody or transfer of the mosaics, the Court will address these matters as necessary in such further proceedings as might be required.

ORDER

This cause came before the Court for trial to determine possession of the mosaics at issue in this case. Whereupon the Court, having heard and reviewed the evidence and having reviewed the briefs and submissions of counsel, and being duly advised in the premises, hereby concludes that possession of the mosaics should be awarded to the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that possession of the mosaics at issue in this case is awarded to the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus.

IT IS SO ORDERED.

DATED this 3rd day of August, 1989.

James E. Noland, Judge

James E. Noland, *U.S. District Judge*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS,
Plaintiffs,
v.
GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG,
Defendants.

CASE NO. IP89-304-C

FINAL JUDGMENT AWARDING POSSESSION

The Court having tried plaintiffs' claim of entitlement to possession of the mosaics that are the subject of this action, and having rendered its Memorandum of Decision and Order dated August 3, 1989, on such claim,

IT IS ORDERED, ADJUDGED AND DECREED that possession of the mosaics at issue in this case is awarded to the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus.

Dated: 8 AUG 1989

/s/ JUDGE NOLAND
James E. Noland, Judge
United States District Court,
Southern District of Indiana,
Indianapolis Division

Copies to:

JOE C. EMERSON
JOSEPH H. YEAGER, JR.
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204

EZRA H. FRIEDLANDER
FRIEDLANDER & KIRSH
342 Massachusetts Avenue—#200
Indianapolis, Indiana 46204-2161

JOHN D. HOOVER, ESQ.
JOHNSON, SMITH, DENSBORN, WRIGHT & HEATH
1800 Indiana National Bank Tower
One Indiana Square
Indianapolis, Indiana 46204

THOMAS R. KLINE
MANATT, PHELPS, ROTHENBERG & PHILLIPS
1200 New Hampshire Avenue, N.W.
Suite 200
Washington, D.C. 20036

PHILLIP TERRY
McHALE, COOK & WELCH, P.C.
Suite 1100
320 North Meridian Street
Indianapolis, Indiana 46204-5913

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOCEPHALUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS,
Plaintiffs,
v.
GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG,
Defendants.

CASE NO. IP 89-304-C

ORDER PURSUANT TO FED.R.CIV.P. 54(b)

Defendants Goldberg & Feldman Fine Arts, Inc., and Peg Goldberg (collectively "Goldberg & Feldman") having moved the Court to certify a final judgment pursuant to Fed.R.Civ.P. 54(b), and the Court having considered said motion and being duly advised in the premises, the Court hereby finds and determines that:

1. On May 18, 1989, the Court ordered that the trial of plaintiffs' claims for damages in this action be separated from trial of plaintiffs' claim of entitlement to possession of the property at issue in this action ("the Mosaics").

2. The possession claim was tried to the Court from May 30 to June 6, 1989. On August 3, 1989, the Court entered its Memorandum of Decision and Order awarded possession of the Mosaics to the plaintiff, Autocephalus Greek-Orthodox Church of Cyprus.

3. There is no just reason to delay the entry of final judgment on the claim of entitlement to possession of the Mosaics.

IT IS ORDERED pursuant to Fed.R.Civ.P. 54(b) that final judgment shall be entered on plaintiffs' claim to possession of the Mosaics in accordance with the Court's Memorandum of Decision and Order, entered on August 3, 1989.

Dated: 8 AUG 1989

/s/ JUDGE NOLAND

JAMES E. NOLAND, JUDGE
United States District
Court, Southern District
of Indiana, Indianapolis
Division

Copies to:

JOE C. EMERSON
JOSEPH H. YEAGER, JR.
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204

EZRA H. FRIEDLANDER
FRIEDLANDER & KIRSH
342 Massachusetts Avenue—# 200
Indianapolis, Indiana 46204-2161

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WRIGHT & HEATH
1800 Indiana National Bank Tower
One Indiana Square
Indianapolis, Indiana 46204

THOMAS R. KLINE
MANATT, PHELPS, ROTHENBERG & PHILLIPS
1200 New Hampshire Avenue, N.W.
Suite 200
Washington, D.C. 20036

PHILLIP TERRY
MCHALE, COOK & WELCH, P.C.
Suite 1100
320 North Meridian Street
Indianapolis, Indiana 46204-5913

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS, *Plaintiffs*, v. GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG, *Defendants*.	CASE NO. IP 89-304-C

AGREED ORDER

The parties in the referenced litigation, having filed Motions on August 4, 1989 concerning possession of the mosaics pending any appeal of the Court's August 3, 1989 Memorandum of Decision and Order, hereby agree as follows, thereby mooting the need to be heard on said Motions:

1. Plaintiffs shall receive immediate possession of the mosaics, and immediate access to the vault in which the mosaics are currently stored. Defendants may have access to the mosaics inside the vault for appropriate litigation related reasons on reasonable notice and in the presence of a representative of the Plaintiffs.

2. Without Court Order or agreement of the parties, the Plaintiffs will not remove the mosaics from the vault where they are presently located, nor will Plaintiffs conduct any additional restoration of the mosaics, provided that:

A. Defendants do file any appeal of the August 3, 1989 Memorandum of Decision and Order within fourteen (14) calendar days of the entry of this Agreed Order;

B. Defendants do not seek any extension of time in connection with any appeal. Defendants hereby agree that during the pendency of any appeal they shall not

seek any extension of time in connection with any appeal.

3. Subject to paragraph no 2 above, the mosaics will remain in the vault in which they are presently located during the pendency of any appeal provided that Plaintiffs, upon agreement with the Defendants, or pursuant to Court Order, may remove the mosaics to a site within the United States for purposes of evaluating whether steps should be taken to preserve the mosaics and, if appropriate, to take such steps.

4. This Agreed Order shall have no effect on Plaintiffs' right to pursue any alleged damages claims against, *inter alia*, Peg Goldberg and Goldberg & Feldman Fine Arts, Inc.

5. Both parties shall have the right to have the mosaics evaluated by experts in the vault in which they are currently stored with notification to the other party, and in the presence of the other party.

6. Plaintiffs shall not alter or destroy the mosaics and shall not transfer title or possession of the mosaics.

7. No bond shall be required; the current bond posted by the Plaintiffs shall be immediately vacated.

8. Plaintiffs will pay for the vault during the pendency of any appeal.

9. The parties agree to instruct the vault keeper that the Kanakaria mosaics shall not be removed from the vault, other than in accordance with paragraphs 2 and 3 of this Agreed Order.

Dated: August 8th, 1989

/s/ JOHN DAVID HOOVER

JOHN DAVID HOOVER,
Attorney for Plaintiffs
1800 INB Tower
One Indiana Square
Indianapolis, Indiana 46204
(317) 634-9777

Dated: August 8, 1989

/s/ JOE C. EMERSON

JOE C. EMERSON Attorney for
Defendants
Suite 2700
300 North Meridian Street
Indianapolis, Indiana 46204
(317/237-4535)

APPROVED this 8th day of August, 1989.

/s/ JAMES E. NOLAND

JAMES E. NOLAND, JUDGE
United States District Court
Southern District of Indiana,
Indianapolis Division

A-109

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

February 20, 1991

Mr. Thomas R. Kline
1701 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Re: M.L. GOLDBERG INC. FINE ARTS
and PEG GOLDBERG,
v. AUTOCEPHALOUS GREEK-ORTHODOX
CHURCH OF CYPRUS and
THE REPUBLIC OF CYPRUS
Application No. A-637

Dear Mr. Kline:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on February 20, 1991, endorsed thereon the following:

"Denied
JPS
2/20/91"

Very truly yours,
WILLIAM K. SUTER, Clerk
By RANDALL HARRISON

RANDALL HARRISON
Assistant Clerk

NOTE—FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

NOTIFICATION LIST

MR. WILLIAM D. ROGERS
ARNOLD & PORTER
1200 New Hampshire Avenue, NW
Washington, DC 20036

MR. THOMAS R. KLINE
1701 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS, *Plaintiffs,* v. GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG, *Defendants.*	CAUSE NO. IP 89-304-C

ORDER DENYING MOTION TO SET ASIDE JUDGMENT

This cause is before the Court on the defendants' motion to set aside judgment and on defendants' request to take evidence abroad. Whereupon the Court, having considered the memoranda filed in support thereof and in opposition thereto, being duly advised in the premises, and having heard oral argument thereon, now makes the following rulings:

1) Defendants' Motion to Set Aside Judgment is hereby DENIED.

2) Defendants' Motion for Issuance of Letter of Request is hereby DENIED.

A memorandum and Order entered by the Court is filed herewith.

IT IS SO ORDERED.

DATED this 9th day of November, 1990.

(SIGNED JAMES E. NOLAND, JUDGE)

JAMES E. NOLAND, U.S. District Judge

MEMORANDUM ENTRY

This cause is before the Court on the defendants' motion to set aside judgment. On August 3, 1989, after a full trial on the merits, the Court awarded possession of four Byzantine mosaics removed from the Church of Panagia Kanakaria in Northern Cyprus to the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus. *See Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Inc. 1989), *aff'd*, No. 89-2809, slip op. (7th Cir. Oct. 24, 1990).

Defendants now claim that the statement of Savo Kujundzic, an apparent close friend and confidant of Aydin Dikman, presents new evidence sufficient to set aside judgment pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure. In addition, defendants contend that the statement is evidence of a fraud demanding relief under Rule 60(b)(3) of the Federal Rules of Civil Procedure.

It is unnecessary to restate the findings of this Court which were fully set forth in the opinion of August 3, 1989. Suffice it to say that the Kujundzic statement merely disputes the deposition testimony of Constantine Leventis, a representative of Cyprus, as to details of the Menil Foundation transaction. It was during that late 1983 transaction that certain events occurred in the handling of the St. Theomonianos frescoes which might have caused Leventis to believe the Kanakaria mosaics were also in the hands of the same unidentified person. Leventis testified that he never learned that Aydin Dikman was that person.

As pointed out in substantial detail hereafter, such knowledge by Leventis, even if conceded, is of no advantage to Defendant Goldberg and cannot change the outcome of this litigation. The mosaics were effectively concealed by the undisputed thief until Defendant Goldberg acquired the same. Many witnesses testified and numerous documents were admitted into evidence. The decision rendered in this case was compelled by substantial testimony and does not rise or fall upon the testimony of Leventis. His testimony was only contributory to a complete understanding of the events surrounding the original theft and subsequent sale of the mosaics.

Both this Court and the Seventh Circuit Court of Appeals reached the same conclusion:

> Thus, Judge Noland ruled that Cyprus was not, nor reasonably should have been, on notice as to the possessor or location of the mosaics until late 1988. *Autocephalous*, 717 F. Supp. at 1389-91.
>
> • • •
>
> . . . In sum [the] conclusion that Cyprus was duly diligent and should not have discovered its cause of action before late 1988 stands on firm factual footing.

Autocephalous Greek-Orthodox Church, No. 89-2809, slip op. at 21-23 (7th Cir. Oct. 24, 1990). The Seventh Circuit further held:

> In the context of a replevin action for particular, unique and concealed works of art, a plaintiff cannot be said to have "discovered" his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that "other" is.

Autocephalous Greek-Orthodox Church, No. 89-2809, slip op. at 22. Lest there be any misunderstanding of the holding in the majority opinion, Judge Cudahy, concurring, added:

> [W]henever the possessor of lost or stolen personal property commits "fraud in the concealment," the statute of limitations does not run against the original owner until that owner has *actual knowledge* of the location of the property and of the identity of the possessor.
>
> This concept is analogous to the requirement that one who asserts a statute of limitations defense against an action for the recovery of *real* property must have possessed the property in an "open and notorious" manner.

Autocephalous Greek-Orthodox Church, No. 89-2809, slip op. at 32. Thus, Defendant Goldberg gains no advantage from her

contentions based on the Kujundzic statement. For the reasons addressed below, the Court denies defendants' motion.

I. Kujundzic's Statement

In support of their defenses asserted at trial, defendants offered evidence that in 1984 Cyprus had recovered from Aydin Dikman a series of frescoes from the Chapel of St. Theomonianos and two other fragments from the same Kanakaria mosaic as those in question. These pieces were obtained through Yanni Petsopoulos, a London-based art dealer. Cyprus' Ambassador to UNESCO, Constantine Leventis, testified that he questioned on several occasions whether the individual from whom these pieces were recovered had any additional pieces of the mosaic, and he was always told no. *Leventis Depo.*, at 51, 52, 54; *see Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1391. Leventis further testified about suspicions that the undisclosed possessor of the frescoes might also have possession of the Kanakaria mosaics. *Leventis Depo.*, at 48-49. However, he stated that the name of the Turkish middleman was never revealed to him. *Id.* In addition to Leventis, other Cypriot officials questioned Petsopoulos and the Menil Foundation[1] about the possessor of the frescoes and the mosaics but no information was forthcoming.[2] *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1391.

Kujundzic states that Leventis met Dikman in London to negotiate Cyprus' acquisition of the St. Theomonianos frescoes. *Kujundzic Statement*, at 38, 39. Defendants suggest that this meeting occurred in late 1983. The negotiations were reportedly unsuccessful. *Id.* at 37-43. Further, Kujundzic states that a second meeting between Dikman and Leventis occurred sometime in 1984. *Id.* at 38, 80-81, 84. Though he refuses to elaborate on this meeting, Kujundzic claims that Leventis purchased

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[1] The Menil Foundation acquired the frescoes for the Church of Cyprus. *See Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1390.

[2] Information about the possessor was withheld for fear of reprisals against any remaining artwork and against individuals involved in the recovery. *See Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1391.

unspecified Cypriot antiquities from Dikman. *Id.* at 84. Kujundzic claims to have been an eyewitness at both meetings.[1]

II. Standard of Review

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party:
>
> * * *
>
> The motion shall be made within a reasonable time, and for reasons . . . (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Rule 60(b) provides for extraordinary relief that may be invoked only upon a showing of exceptional circumstances. *DiVito v. Fidelity and Deposit Co. of Maryland*, 361 F.2d 936, 938 (7th Cir. 1966). A motion to vacate judgment is "addressed to the sound discretion of the district court." *Bradley Bank v. Hartford Accident and Indem. Co.*, 737 F.2d 657, 661 (7th Cir. 1984) (citation omitted); *Planet Corp. v. Sullivan*, 702 F.2d 123, 125 (7th Cir. 1983). Strong policy favors the finality of judgments: "Judgments in civil cases fix the rights of parties and

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[1] Defendants contend that Kujundzic's statement is consistent with a 1989 article published in the *Saturday Evening Post*. *See* Mannheimer, "Litigators of the Lost Art", *Saturday Evening Post*, October 1989, p. 66. The article contains a journalistic account of the trial and a speculative account of a secret deal to purchase mosaics. Nothing in the article rises to the level of admissible evidence.

entitle them to go about their lives [and] may be reopened only for extraordinary reasons." *Metlyn Realty Corp. v. Esmark*, 763 F.2d 826, 830 (7th Cir. 1985); see *Margoles v. Johns*, 798 F.2d 1069, 1072 (7th Cir. 1986), *cert. denied*, 482 U.S. 905, 107 S.Ct. 2482 (1987). Moreover, after a full trial on the merits, courts display a "scrupulous regard for the aims of finality."[4] 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2857 at 160 (1973). In an unusual request, defendants now seek to set aside the judgment after a full and fair trial on the merits.

III. Discussion

A. Timeliness of the Motion

Rule 60 requires that a motion to vacate judgment be made within a "reasonable time." Defendants filed their motion on August 3, 1990, just under one year after the entry of judgment. However, the one year limit in Rule 60 is an extreme outer limit and a "motion will be rejected as untimely if not made within a 'reasonable time' even though the one year period has not expired." *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986) (*quoting* C. Wright and A. Miller, *Federal Practice and Procedure* § 2866 at 232 (1973)). "[A]s the delay in making the motion approaches one year there should be a corresponding increase in the burden that must be carried to show that the delay was 'reasonable.'" *Planet Corp.*, 702 F.2d at 126 (citation omitted).

On March 31, 1989, the parties entered an "Agreed Order," which was approved by the Court. In the Order the parties agreed to a trial date of May 30, 1989. Defendants now argue that they have discovered additional evidence which, in part because of time constraints, they were unable to discover earlier. Defendants' post-judgment motion is not timely.

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[4] This contrasts with practice involving default judgments wherein Rule 60 is liberally construed. "There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2857 at 160 (1973).

Goldberg indicates that she met Kujundzic in Amsterdam in September, 1989, and through subsequent telephone conversations with him, learned of the information he allegedly possessed. *Goldberg Affidavit*, ¶ 4 (as corrected). Goldberg also indicates that Kujundzic visited "Turkish Cyprus" on her behalf in early 1990. Id. He agreed to testify in May, 1990. *Supplemental Goldberg Affidavit*, ¶ 4. Despite the supposedly compelling nature of this new information, Goldberg waited until August, 1990, to present the motion to set aside judgment. There is simply no justification for the filing of this motion almost one year after a full trial on the merits.

B. Newly Discovered Evidence

In order for Kujundzic's statement to warrant relief from judgment under Rule 60(b)(2), the following prerequisites must be met:

> 1) the new evidence was in existence at the time of trial or pertains to facts in existence at the time of trial;
>
> 2) it was discovered following trial;
>
> 3) due diligence on the part of the movant to discover the new evidence is shown or may be inferred;
>
> 4) the evidence is admissible;
>
> 5) it is credible;
>
> 6) the new evidence is material;
>
> 7) it is not merely cumulative or impeaching; and, finally,
>
> 8) the new evidence is likely to change the outcome.

Gomez v. Chody, 867 F.2d 395, 405 (7th Cir. 1989); *Mumford v. Bowen*, 814 F.2d 328, 330 (7th Cir. 1986). If any of the prerequisites is not met, a Rule 60(b)(2) motion must fail. *Matter of Wildman*, 859 F.2d 553, 558 (7th Cir. 1988). Plaintiffs contend that Kujundzic's statement fails to satisfy the third through eighth prerequisites. While Kujundzic's statement contains some

rather incredible assertions, for the limited purposes of this motion the Court accepts the statement as true.

1. Due Diligence

Goldberg encountered Kujundzic through a meeting with Dikman in Amsterdam approximately three months after the trial ended. Dikman, the putative seller, clearly stands as the central figure in Goldberg's attempt to impute knowledge of the mosaics' whereabouts to Cyprus. Yet Goldberg never met with Dikman after her purchase of the mosaics and before the end of the trial. Out of Goldberg's late meeting with Dikman comes Kujundzic with his supposed new information. Goldberg explains how this information came to be discovered but she fails to explain why the information *could not* have been discovered earlier. *See Mumford v. Bowen*, 814 F.2d at 330 ("plaintiff claims that the contents [of the evidence] *were not* discovered in time to move for a new trial under Rule 59(b), but she offers no explanation why they *could not* have been discovered, as required by Rule 60"). Defendants must show that their lack of knowledge regarding Kujundzic's information was not due to lack of diligence. *Id.*

At the close of trial, the Court gave counsel for both plaintiffs and defendants additional time to submit certain depositions. Counsel for defendant Goldberg was given an opportunity to submit a deposition of a representative of Interpol yet to be taken. *See* Transcript at VI-665 *et seq*. Defendants neither asked for additional time to submit further evidence nor sought to submit the type of evidence now proposed. Defendants do not satisfactorily explain why the circumstances with Dikman, and hence Kujundzic, were not aggressively pursued earlier. No exceptional circumstances exist to excuse the failure to pursue this avenue. *See Gomez*, 867 F.2d at 405 (7th Cir. 1989) (no "exceptional circumstances" existed to excuse the failure to "aggressively pursue" the deposition of a key witness as required under Rule 60(b)).

Furthermore, defendants chose a defense strategy that did not include the deposition testimony of Yanni Petsopoulos or Dr.

Vassos Karageorghis.[1] At trial, defendants attempted to show that Cyprus knew of Dikman's connection to the mosaics. The Court rejected defendants' theory because the record did not support the argument that Cyprus was on notice of the possessor of the mosaics before late 1988 and because any knowledge of Cyprus acquired after late 1983 was irrelevant to the statute of limitations defense. *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1388-1391. This finding was upheld by the Seventh Circuit. *Autocephalous Greek-Orthodox Church*, No. 89-2809, slip op. at 23. Defendants cannot at this late date attempt to buttress a failed argument by presenting new testimony that they chose to forego at trial.

2. Cumulative or Impeaching Evidence

Under Rule 60(b)(2), a judgment may not be set aside based on evidence that is merely cumulative or impeaching. As noted above, defendants theorized that Cyprus knew of Dikman's connection to the mosaics. Defendants had ample opportunity to impeach plaintiffs' witnesses and to offer their own evidence at trial. Relevant testimony to the issue of Cyprus' knowledge was provided by Leventis, Walter Hopps, Dominique de Menil, and Athanasios Papageorghiou. Defendants also submitted newspaper articles and documents concerning the recovery of different mosaic fragments in 1984 and the Menil Foundation's recovery of the St. Theomonianos frescoes. A variety of evidence was submitted relevant to defendants' theory. The new evidence offered by defendants is merely cumulative of that presented at trial.

Kujundzic's statement also is offered merely to impeach the credibility of Leventis. Defendants had the opportunity to impeach plaintiffs' witnesses at trial. Leventis was simply one of many witnesses and the impeachment of his testimony would not affect the outcome of this case. The impeachment evidence offered does not warrant setting aside the judgment.

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[1] Defendants now seek to compel deposition testimony of Petsopoulos through the issuance of letters of request. Defendants' motion for issuance of letters of request is dealt with later in the entry. Defendants never sought to compel discovery involving Dr. Karageorghis.

3. Change in the Outcome

Rule 60(b)(2) requires that the new evidence must be material and likely to change the outcome of the litigation. Kujundzic states that Cyprus knew of the mosaics' whereabouts by virtue of two meetings between Dikman and Leventis. The first of these two meetings allegedly occurred in late 1983.[6]

At trial, defendants asserted the statute of limitations as a defense to plaintiffs' action to recover the mosaics. Under Indiana law, plaintiffs had six years from the time the cause of action accrued in which to sue for recovery of the mosaics. The Court held that events occurring within the applicable six year period could not sustain a statute of limitations defense. Specifically, the Court determined that the cause of action accrued in late 1988. *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1391. The Seventh Circuit affirmed this determination. *Autocephalous Greek-Orthodox Church*, No. 89-2809, slip. op. at 23 (J. Cudahy concurring at 34). The complaint was filed on March 29, 1989; therefore, events occurring after March, 1983, would not support the statute of limitations defense.

Kujundzic's account of a meeting in late 1983 falls within the applicable six year limitations period. The account, taken as true, cannot change the outcome of the case and is accordingly immaterial. Kujundzic's statement has no impact on the Court's determination of Goldberg's statute of limitations defense. Plaintiffs' action was timely filed.

Similarly, defendants' reasserted defenses of laches and equitable estoppel must fail.[7] Nothing in Kujundzic's statement persuades the Court that Cyprus' search was less than diligent. By contrast, Goldberg did not act in good faith in purchasing the

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[6] Kujundzic gives no specific date for this meeting. Defendants' counsel surmises that the meeting occurred in late 1983. Despite the highly speculative nature of this date, for purposes of this motion, the Court accepts the date as correct.

[7] A laches defense ordinarily will not apply if the suit was filed within the limitations period unless "the laches are of such a character . . . as to work an equitable estoppel." *Pickett v. Pickett*, 470 N.E.2d 751, 754 (Ind. Ct. App. 1984) (*quoting Hegarty v. Curtis*, 121 Ind. App. 74, 89, 95 N.E.2d 706, 712-713 (1950)).

mosaics. Her cursory inquiry in the face of suspicious circumstances reflected negatively on the credibility of her case

The equitable defenses of laches and estoppel are available only to those with "clean hands." *Precision Instrument Mfg. Co. v. Automotive Maintenance e Machinery Co.*, 324 U.S. 806, 814, 65 S. Ct. 993, 997 (1945); *Alber v. Standard Heating & Air Conditioning, Inc.* 476 N.E.2d 507, 510 (Ind. Ct. App. 1985). Among the nefarious characters that Goldberg knowingly associated with was a person convicted of art fraud. Michel van Rijn. Kujundzic describes himself as an associate of Dikman, the black market seller who surreptitiously held the mosaics after acquiring them under highly questionable circumstances. Goldberg certainly does not qualify under the doctrine of clean hands.

Further, the doctrine of laches requires proof of the following three elements:

> 1) inexcusable delay in asserting a right;
>
> 2) implied waiver arising from knowing acquiescence in existing conditions; and
>
> 3) circumstances causing prejudice to the adverse party.

Alber, 476 N.E.2d at 509 (citations omitted). Kujundzic's statement provides nothing to persuade the Court that plaintiffs were less than diligent in determining who possessed the mosaics. Goldberg was not prejudiced by the actions of Cyprus. To the contrary, she relied on a few last minute telephone calls and the representations of financially interested middlemen. Kujundzic's statement does not satisfy the elements necessary for a laches defense. As at trial, Goldberg's laches defense must fail.

Likewise, Kujundzic's statement cannot resurrect Goldberg's estoppel defense. Equitable estoppel requires that:

> 1) a false representation or concealment of material fact is made with actual or constructive knowledge of the truth;
>
> 2) the representation is made to one who is without knowledge or scienter, with the intent that he or she will rely upon it; and

> 3) the second party relies upon the falsehood to his or her detriment.

Alber, 476 N.E.2d at 510 (citation omitted). "In contrast to laches, which involves injury due to non-action, estoppel is associated with positive conduct which misleads another person." *Id.* As noted above, Goldberg did not rely on any misrepresentation by Cyprus but rather on her own cursory investigations. She has not satisfied the requirements of an estoppel defense.

C. Fraud

As with motions under Rule 60(b)(2), motions under Rule 60(b)(3) must be timely filed. Goldberg offers no satisfactory explanation why the issues were not aggressively pursued prior to trial. The motion has not been filed within a reasonable time.

Under Rule 60(b)(3), Goldberg is required to show by clear and convincing evidence that the judgment was obtained through misconduct (by the adverse party) and that the misconduct was of such a nature that it prevented her from fully and fairly presenting her case. *West v. Love*, 776 F.2d 170, 175 (7th Cir. 1985); *Metlyn Realty Corp.*, 763 F.2d at 832. The alleged fraud concerns a perceived conflict between Kujundzic's statement and Leventis' testimony. Kujundzic's statement does not rise to the level of clear and convincing evidence of misconduct, let alone misconduct that prevented Goldberg from fully and fairly presenting her case. Goldberg chose her path of argument before trial; she cannot change her approach after losing the argument on the merits.

Additionally, the alleged fraud must be material to the case. *See Simons v. Gorsuch*, 715 F.2d 1248, 1252-1253 (7th Cir. 1983) (alleged misrepresentations were "essentially irrelevant to the legal issues upon which the case turned"). As previously noted, the knowledge imputed to Cyprus, even if true, would have no bearing on the outcome of this case. The alleged fraud is therefore immaterial. Moreover, as noted above, defendants have not demonstrated due diligence in presenting the motion.

4. Additional Discovery

In addition to the motion to set aside judgment, Goldberg has moved for additional discovery and issuance of a letter of request pursuant to Rule 28(b) of the Federal Rules of Civil Procedure and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 U.S.C. § 1781. The proposed letter of request is directed to the appropriate authority in the United Kingdom to compel deposition testimony by Yanni Petsopoulos.

Having determined that the motion to set aside judgment is without merit, the Court concludes that the additional discovery sought in this adjunct motion is not warranted. Kujundzic's statement, accepted as true, has no effect on the outcome of this case. The Court pays special heed to the finality of judgments and will not sustain the unusual request for post-judgment discovery.

IV. Conclusion

For the foregoing reasons, the Court concludes that defendants' motion to set aside judgment should be denied. In addition, the Court concludes that defendants' request for additional discovery should be denied. In summary, little significance can be attached to the statement of Savo Kujundzic, save the possible impeachment of testimony by Constantine Leventis. When taken at its highest value, the conclusory statement has no effect on the outcome of the trial. A contrary determination would defeat the aims of finality in litigation. Accordingly, defendants' motions are hereby denied.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 19, 1991

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

ALTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and REPUBLIC OF CYPRUS, *Plaintiffs-Appellees*, No. 90-3775 v. GOLDBERG & FELDMAN FINE ARTS, INCORORATED and PEG GOLDBERG, *Defendants-Appellants*.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division: No. 89 C 304 Judge James E. Noland

As of this date there has been no response to this court's rule to show cause of February 11, 1991. Accordingly, pursuant to that rule and Circuit Rule 31(c)(2),

IT IS ORDERED that this appeal is DISMISSED for want of prosecution.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS,
Plaintiffs,
v.
GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG,
Defendants.

CASE NO. IP89-304-C

COMPLAINT

PARTIES

1. Plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus ("Church of Cyprus"), is an autonomous and independent branch of the Christian Orthodox Church, and has its principal offices in Nicosia, Cyprus.

2. Plaintiff, the Republic of Cyprus, is a foreign State having sovereignty over the entire island of Cyprus in the Mediterranean Sea. The principal governmental offices for the Republic of Cyprus are located in Nicosia, Cyprus. The address for the Embassy of Cyprus in the United States is 2211 R Street, N.W., Washington, D.C. 20006.

3. Upon information and belief, defendant Goldberg & Feldman Fine Arts, Inc. previously known as Alliance III Fine Art Services, Inc., is a corporation which was incorporated under the laws of the State of Indiana and has its principal place of business at 12800 Shelborne Road, Carmel, Indiana 46032.

4. Upon information and belief, defendant Peg Goldberg is a citizen of the State of Indiana who resides at 12301 Shelborne Road, Carmel, Indiana 46032.

5. Upon information and belief, defendant Peg Goldberg is an owner, partner, officer, director, employee and/or shareholder of defendant Goldberg & Feldman Fine Arts, Inc.

JURISDICTION

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

7. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a).

CLAIMS FOR RELIEF

Count I

9. The Church of Cyprus is the true and lawful owner and legal title holder of the Church of Panagia Kanakaria ("Kanakaria Church") in the Lythrankomi village of the Famagusta District of Cyprus and of all physical property located therein, including all mosaics that are or were at any time affixed to the wall of the apse of the Kanakaria Church.

10. In or about July 1974, military forces from Turkey invaded Cyprus and placed most of the northern part of Cyprus, including the village of Lythrankomi, under military occupation

11. After the aforementioned invasion and occupation occurred, the Turkish army forced the Greek Cypriot population, including officials of the Republic of Cyprus and persons employed by or associated with the Church of Cyprus, to leave the occupied area. Thus, the Kanakaria Church has been inaccessible to the plaintiffs since the time of the aforementioned invasion and occupation.

12. The Church of Cyprus has never been sold, made a gift of, or otherwise transferred title or any other ownership interest in the Kanakaria Church or in any of the physical property located therein, including any and all mosaics, to the defendants or to any other person or entity.

13. The Church of Cyprus has never voluntarily relinquished or transferred possession of the Kanakaria Church or any of the physical property, including any and all mosaics, located therein.

14. At the time of the aforementioned invasion and occupation, a mosaic that dated back to the Sixth Century A.D. was affixed to the apse of the Kanakaria Church. This mosaic included depictions of the Christ Child, an Archangel, the Apostle James and the Apostle Matthew ("Four Kanakaria Mosaics").

15. Upon information and belief, the Four Kanakaria Mosaics were removed from the Kanakaria Church in or about 1979.

16. Upon information and belief, said removal was conducted by, or with the consent of, the military forces that occupied northern Cyprus.

17. The Church of Cyprus has never given its authority or consent for the removal of the Four Kanakaria Mosaics.

18. The removal of the Four Kanakaria Mosaics from the Kanakaria Church violated the laws of the Republic of Cyprus, international treaties and conventions, and other international and military laws.

19. Neither of the plaintiffs discovered that the Four Kanakaria Mosaics were missing from the Kanakaria Church until approximately 1980.

20. After learning that the Four Kanakaria Mosaics were missing from the Kanakaria Church, the plaintiffs attempted to learn the fate and location of the Four Kanakaria Mosaics.

21. In or about July 1988, defendant Goldberg & Feldman Fine Arts, Inc. ("Goldberg & Feldman") acquired possession of the Four Kanakaria Mosaics.

22. Goldberg & Feldman acquired possession of the Four Kanakaria Mosaics by virtue of the acts of defendant Peg Goldberg, who at all pertinent times was acting as an owner,

partner, officer, director and/or shareholder of Goldberg & Feldman, and within the course and scope of her employment by Goldberg & Feldman.

23. In the alternative, in or about July 1988, defendant Peg Goldberg acquired possession of the Four Kanakaria Mosaics.

24. Neither of the plaintiffs discovered, or had reason to know, that the Four Kanakaria Mosaics were in the possession of the defendants until approximately January 9, 1989.

25. On March 22, 1989, the Church of Cyprus and the Republic of Cyprus, acting through their attorneys, sent letters to the defendants informing them that their possession of the Four Kanakaria Mosaics was not authorized or lawful, and demanding return of the mosaics to said attorneys for delivery to the Church of Cyprus. The letters requested that the defendants respond to the demand on or before March 27, 1989.

26. In response to the plaintiffs' demand for return of the Four Kanakaria Mosaics, counsel for defendants refused the immediate return of the mosaics. Counsel for defendants further informed counsel for plaintiffs that defendants have a sale of the mosaics pending, and that efforts to sell the Four Kanakaria Mosaics would continue.

27. Upon information and belief, at the time the defendants first exerted possession and control of the Four Kanakaria Mosaics they knew or were aware of a high probability that such possession and control was not authorized by the true and lawful owner of the mosaics. In the alternative, by virtue of receiving the letter described in Paragraph 25, the defendants learned or became aware of a high probability that their possession and control of the Four Kanakaria Mosaics was not authorized by the true and lawful owner of the mosaics.

28. Upon information and belief, at the time the defendants first exerted possession and control of the Four Kanakaria Mosaics they knew or were aware of a high probability that the mosaics had been stolen from the Kanakaria Church. In the alternative, by virtue of receiving the letter described in Paragraph 25, the defendants learned or became aware of a high

probability that the mosaics had been stolen from the Kanakaria Church.

29. As a result of the defendants' actions, the Church of Cyprus has been and continues to be deprived of possession of property of which it is the true and lawful owner.

30. The harm sustained by the Church of Cyprus is irreparable, cannot be remedied adequately by monetary damages, and can only be remedied adequately by requiring the defendants to return the Four Kanakaria Mosaics to the Church of Cyprus.

31. The Church of Cyprus repeats the allegations made in Paragraph 1-30 of the Complaint as though fully set forth herein.

32. The defendants are actively seeking to sell the Four Kanakaria Mosaics, and may have a sale pending.

33. There is a substantial and imminent threat that the defendants will sell and/or transfer possession of the Four Kanakaria Mosaics to a third party.

34. If the threat described in the preceding paragraph occurs, the Church of Cyprus will sustain irreparable harm and injury for which there is not adequate remedy at law, in that the Church of Cyprus could be precluded from recovering the Four Kanakaria Mosaics.

35. The substantial threat of imminent irreparable harm to the Church of Cyprus can be eliminated only by the issuance, pursuant to Fed. R. Civ. P. 65, of a temporary restraining order and/or preliminary injunction which, pending resolution of the merits of the claims of the Church of Cyprus, would:

> (a) preclude the Defendants, and any of their agents or employees or persons within their control, from taking any action whatsoever to destroy, alter, sell or transfer possession of the Four Kanakaria Mosaics; and,
>
> (b) provide Plaintiffs' agent an opportunity to inspect all Kanakaria mosaics in Defendants' possession within two (2) days of the Court's entry of a Temporary Restraining Order.

36. There is a reasonable likelihood and probability that the Church of Cyprus will prevail on the merits of its claims.

37. The substantial threat of imminent irreparable harm to the Church of Cyprus outweighs any harm to defendants that a temporary restraining order and/or preliminary injunction might cause.

38. The issuance of a temporary restraining order and/or preliminary injunction will not disserve the public interest.

Count III

39. The Republic of Cyprus repeats the allegations made in Paragraph 1-38 of the Complaint as though fully set forth herein.

40. The Republic of Cyprus and its citizens have a recognized and legally cognizable interest in the Four Kanakaria Mosaics, and in protecting and preserving them as invaluable expressions of the cultural, religious and artistic heritage of Cyprus.

41. As an expression of this interest, in or about 1935, the Republic of Cyprus enacted legislation to protect antiquities and ancient monuments, including the Kanakaria Church and its mosaics, from alteration, damage, destruction and unauthorized export ("Cyprus Antiquities Law")

42. In addition, the Republic of Cyprus is a party to international treaties and conventions that protect cultural property such as the Four Kanakaria Mosaics.

43. The removal of the Four Kanakaria Mosaics from the Kanakaria Church, as well as the export of the mosaics from Cyprus and any purported sale of the mosaics, violated the Cyprus Antiquities Law and international treaties and conventions specifically designed to protect cultural property.

44. The Republic of Cyprus and its citizens have been otherwise unlawfully deprived of irreplaceable and invaluable aspects of their cultural, religious and artistic heritage.

45. The interest of the Republic of Cyprus and its citizens in the Four Kanakaria Mosaics has been converted by the defendants.

46. The harm sustained by the Republic of Cyprus and its citizens cannot be remedied unless the defendants are required to return the Four Kanakaria Mosaics to the Church of Cyprus.

Count IV

47. The Republic of Cyprus repeats the allegations made in Paragraphs 1-46 of the Complaint as through fully set forth herein.

48. If the threat described in Paragraph 33 occurs, the Republic of Cyprus and its citizens will sustain irreparable harm and injury for which there is not adequate remedy at law, in that they will suffer a permanent loss of irreplaceable and invaluable aspects of their cultural, religious and artistic heritage.

49. The substantial threat of imminent irreparable harm to the Republic of Cyprus and its citizens can be eliminated only by the issuance, pursuant to Fed.R. Civ. P. 65, of a temporary restraining order and/or preliminary injunction which, pending resolution of the merits of the claims of the Republic of Cyprus, would:

> (a) preclude the preclude the Defendants, and any of their agents or employees or persons within their control, from taking any action whatsoever to destroy, alter, sell or transfer possession of the Four Kanakaria Mosaics; and,
>
> (b) provide Plaintiffs' agent an opportunity to inspect all Kanakaria mosaics in Defendants' possession within two (2) days of the Court's entry of a Temporary Restraining Order.

50. There is a substantial likelihood and probability that the Republic of Cyprus will prevail on the merits of its claims.

51. The substantial threat of of imminent irreparable harm to the Church of Cyprus and its citizens outweighs any harm to defendants that a preliminary injunction might cause.

52. The issuance of a temporary restraining order and/or preliminary injunction will not disserve the public interest.

Count V

53. The Republic of Cyprus repeats the allegations made in Paragraphs 1-52 of the Complaint as through fully set forth herein.

54. The defendants' conduct constitutes criminal conversion within the meaning of Indiana Code § 35-43-4-3.

55. The defendants' conduct constitutes the receipt of stolen property within the meaning of Indiana Code § 35-43-4-2.

56. If the Four Kanakaria Mosaics have already been damaged, altered, destroyed, sold or transferred by the defendants, or if the mosaics are damaged, altered, destroyed, sold or transferred by the defendants before this Court renders judgment on the claims made in this Complaint, then the plaintiffs will have sustained pecuniary loss within the meaning of Indiana Code § 35-4-30-1 as a proximate result of the defendants' conduct.

WHEREFORE,

(a) the Church of Cyprus respectfully requests that the Court

i. grant the preliminary injunctive relief described in Paragraph 35 pending resolution of the merits of the claims of the Church of Cyprus;

ii. declare that the Church of Cyprus is the true and lawful owner of, and is entitled to immediate possession of, the Four Kanakaria Mosaics;

iii. issue an order requiring the immediate return of the Four Kanakaria Mosaics to the Church of Cyprus;

iv. award damages to the Church of Cyprus in an amount equal to three times the pecuniary loss it has or will sustain;

v. award the Church of Cyprus its costs, including reasonable attorneys' fees;

vi. award the Church of Cyprus such other relief as may be appropriate under the circumstances; and

(b) the Republic of Cyprus respectfully requests that the Court

i. grant the preliminary injunctive relief described in Paragraph 49 pending resolution of the merits of the claims of the Republic of Cyprus;

ii. declare that the Republic of Cyprus and its citizens have a legally cognizable interest in preserving their cultural, religious and artistic heritage;

iii. issue a permanent injunction ordering the immediate return of the Four Kanakaria Mosaics to the Church of Cyprus;

iv. award damages to the Republic of Cyprus in an amount equal to three times the pecuniary loss it has or will sustain;

v. award the Republic of Cyprus its costs, including reasonable attorneys' fees;

award the Republic of Cyprus such other relief as may be appropriate under the circumstances.

Respectfully submitted,

/s/ JOHN DAVID HOOVER

JOHN DAVID HOOVER
JOHNSON, SMITH, DENSBORN,
WRIGHT & HEATH
1800 Indiana National Bank Tower
One Indiana Square
Indianapolis, IN 46204
(317) 634-9777

Attorneys for Plaintiffs

/s/ THOMAS R. KLINE by JDH

THOMAS R. KLINE
THOMAS E. STARNES
DOUGLAS E. LAVIN
JUNE L. WALTON
MANATT, PHELPS, ROTHENBERG &
PHILLIPS
1200 New Hampshire Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 463-4300

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS, *Plaintiffs*, v. GOLDBERG & FELDMAN FINE ARTS, INC., and PEG GOLDBERG, *Defendants*.	CAUSE NO. IP 89-304-C

ANSWER

For their answer to the complaint of plaintiffs Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus, defendants Goldberg & Feldman Fine Arts, Inc. and Peg Goldberg (collectively, "Goldberg & Feldman") say:

First Defense: Admissions and Denials

1. Goldberg & Feldman are without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph 1 of the Complaint.

2. Goldberg & Feldman admit that plaintiff Republic of Cyprus is a foreign state. Goldberg & Feldman are without information or knowledge sufficient to form a belief as to the location of the principal governmental offices for the Republic of Cyprus or the address for the Embassy of the Republic of Cyprus in the United States. Goldberg & Feldman deny that the Republic of Cyprus has sovereignty over the entire island of Cyprus in the Mediterranean Sea.

3-4. Goldberg & Feldman admit the allegations of paragraphs 3 and 4 of the Complaint.

5. Peg Goldberg is an owner/shareholder, officer and employee of Goldberg & Feldman Fine Arts, Inc. Goldberg &

Feldman deny the remaining allegations of paragraph 5 of the Complaint.

6-8. Goldberg & Feldman admit the allegations of paragraphs 6 through 8 of the Complaint.

Count I

9. Goldberg & Feldman deny the allegations of paragraph 9 of the Complaint.

10-11. Goldberg & Feldman are without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraphs 10 and 11 of the Complaint.

12. Goldberg & Feldman deny the allegations of paragraph 12 of the Complaint.

13. Goldberg & Feldman are without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph 13 of the Complaint.

14. Goldberg & Feldman admit that sometime prior to 1974 a mosaic dating to approximately the fifth or sixth century, A.D., was affixed to the apse of the Kanakaria church and that the mosaic included depictions of the Christ Child, an archangel, the apostle James and the apostle Matthew. Goldberg & Feldman are without information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph 14 of the Complaint.

15. Goldberg & Feldman admit that the mosaics were removed from the ruins of the Kanakaria Church. Goldberg & Feldman deny the remaining allegations of paragraph 15 of the Complaint.

16-17. Goldberg & Feldman are without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraphs 16 and 17 of the Complaint.

18. Goldberg & Feldman deny the allegations of paragraph 18 of the Complaint.

19-20. Goldberg & Feldman are without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraphs 19 and 20 of the Complaint.

21-22. Goldberg & Feldman admit the allegations of paragraph 21 and 22 of the Complaint.

23. Goldberg & Feldman deny the allegations of paragraph 23 of the Complaint.

24. Goldberg & Feldman are without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph 24 of the Complaint.

25. Goldberg & Feldman deny the allegations contained in the letters referred to in paragraph 25 of the Complaint, and otherwise admit the allegations of paragraph 25 of the Complaint.

26. Goldberg & Feldman admit that counsel for defendants refused the immediate return of the mosaics, and that counsel for defendants stated that a sale of the mosaics was pending. Goldberg & Feldman deny the remaining allegations of paragraph 26 of the Complaint.

27-30. Goldberg & Feldman deny the allegations of paragraph 27 through 30 of the Complaint.

Count II

31. Goldberg & Feldman incorporate herein by reference their responses set forth above to the allegations of paragraphs 1 through 30 of the Complaint.

32. Goldberg & Feldman admit that at or about the time the Complaint was filed, Goldberg & Feldman had been negotiating concerning a sale for the mosaics. Goldberg & Feldman deny the remaining allegations of paragraph 32 of the Complaint.

33-38. Goldberg & Feldman deny the allegations of paragraphs 33 through 38 of the Complaint.

Count III

39. Goldberg & Feldman incorporate herein by reference their responses set forth above to the allegations in paragraphs 1 through 38 of the Complaint.

40-41. Goldberg & Feldman deny the allegations of paragraphs 40 and 41 of the Complaint.

42. Goldberg & Feldman admit that the Republic of Cyprus is a party to international treaties and conventions. Goldberg & Feldman deny the remaining allegations of paragraph 42 of the Complaint.

43-46. Goldberg & Feldman deny the allegations of paragraphs 43 through 46 of the Complaint.

Count IV

47. Goldberg & Feldman incorporate herein by reference their responses set forth above to the allegations of paragraphs 1 through 46 of the Complaint.

48-52. Goldberg & Feldman deny the allegations of paragraphs 48 through 52 of the Complaint.

Count V

53. Goldberg & Feldman incorporate herein by reference their responses set forth above to the allegations of paragraphs 1 through 52 of the Complaint.

54-56. Goldberg & Feldman deny the allegations of paragraphs 54 through 56 of the Complaint.

Second Defense—Bona Fide Purchase

The mosaics were taken from the ruins of the Kanakaria Church not later than 1980. Goldberg & Feldman Fine Arts, Inc. purchased the mosaics in Switzerland in 1988. Under Swiss law, Goldberg & Feldman Fine Arts, Inc. is a bona fide purchaser of the mosaics and has acquired good title regardless of the circumstances of the mosaics' removal from Cyprus or the title of its seller.

Third Defense—Statute of Limitations

By the time plaintiffs commenced this action,

(1) at least fourteen years had passed since they lost possession of the mosaics; and

(2) at least eight years had passed since they learned that the mosaics had been removed from the ruins of the Kanakaria Church.

Accordingly, this action is barred by applicable statutes of limitations.

Fourth Defense—Waiver and Estoppel

Both plaintiffs learned in 1980 or earlier that the mosaics had been removed from the ruins of the Kanakaria Church. On information and belief, however, plaintiffs failed to notify appropriate international authorities and organizations of the loss of the mosaics. Goldberg & Feldman Fine Arts, Inc. reasonable relied on the absence of such notice in purchasing the mosaics. Accordingly, plaintiffs are estopped from claiming, and have waived the claim, that their title is superior to that of Goldberg & Feldman Fine Arts, Inc.

Fifth Defense—Absence of Diligence and Laches

Since no later than 1980, plaintiffs have known of the removal of the mosaics from the ruins of the Kanakaria Church. Upon information and belief, since no later than 1982, plaintiffs have known or had reason to know of possession of the mosaics by Aiden Diekman in Munich, West Germany. However, plaintiffs failed to take any action for at least seven years to assert their claim to the mosaics or to put the world on notice of their claim to the mosaics through recognized means. Plaintiffs are barred by their own lack of diligence and the doctrine of laches from pursuing this action.

Sixth Defense—Failure to State a Claim Upon Which Relief Can Be Granted

Because plaintiffs have pleaded no facts to avoid the bar of the statute of limitations, the Complaint fails to state a claim upon which relief can be granted. The claim of the plaintiff Republic of Cyprus also independently fails to state a claim for relief.

WHEREFORE, Goldberg & Feldman Fine Arts, Inc. and Peg Goldberg request that the Court enter judgment for them and against plaintiffs, the Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus, that plaintiffs take nothing by their Complaint, that the Court award Goldberg & Feldman the costs of this action, and for all other appropriate relief.

BAKER & DANIELS

By (SIGNED BY JOSEPH H. YEAGER, JR.)

FRED E. SCHLEGEL

JOE C. EMERSON
JOSEPH H. YEAGER, JR.
810 Fletcher Trust Building
Indianapolis, Indiana 46204
(317) 237-4535

Attorneys for Defendants
GOLDBERG & FELDMAN FINE ARTS, INC. AND PEG GOLDBERG

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer has been served upon John David Hoover, Johnson, Smith, Densborn, Wright & Heath, 1800 Indiana National Bank Tower, One Indiana Square, Indianapolis, Indiana 46204, and Thomas R. Kline, Thomas E. Starnes, Douglas E. Lavin, and June L. Walton, Manatt, Phelps, Rothenberg & Phillips, 1200 New Hampshire Avenue, N.W., Suite 200, Washington, D.C. 20036, by first-class United States mail, postage prepaid, this 19th day of April, 1989.

(signed JOSEPH H. YAEGER, JR.)

A-145

No. A-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

M.L. GOLDBERG INC. FINE ARTS
and PEG GOLDBERG,

Petitioners.

v.

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS
and THE REPUBLIC OF CYPRUS,

Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit:

Petitioners[1] pray for a 60-day extension of time to file their petition for certiorari in this Court to and including April 20, 1991. The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 24, 1990 and the petitioners' petition for rehearing was denied by that court on November 21, 1990. Petitioners' time to petition for certiorari in this Court expires February 19, 1991.

Copies of the judgment appealed from and the opinion below, as well as the denial of the petition for rehearing, are attached hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] M. L. Goldberg Inc. Fine Arts is the successor company to Goldberg and Feldman Fine Arts, Inc. M. L. Goldberg Inc. Fine Arts has no parent company, affiliates or subsidiaries.

As shown by the opinion below, this case presents an important federal question which was determined adversely to petitioners by the court below: whether and when the courts of the United States should give effect to the domestic acts of a foreign government not recognized by the United States government. The Supreme Court has not addressed the issues since the post-Civil War cases concerning domestic validity of acts of the Confederate government, such as *Texas* v. *White*, 74 U.S. (7 Wall.) 700 (1868), and then only in the more specific context of a government challenging the domestic authority of the United States government. In the current international system, which is replete with civil wars, the rapid rise and fall of governments and the division of national territories, issues concerning U.S. relations with unrecognized governments, in particular the question whether U.S. courts should give effect to the domestic acts of unrecognized governments, are becoming increasingly common and in need of consistent resolution.

Only in the last twenty-four hours has the undersigned counsel been retained to file a petition for certiorari. This is clearly not enough time for drafting a petition and it is for that reason an extension is being requested. Petitioners recognize that applications for extensions of time filed less than ten days before the specified final filing date will be granted only in the most extraordinary circumstances but we believe that such circumstances are present here.

Wherefore petitioners respectfully request that an order be entered extending their time to petition for certiorari to and including April 20, 1991.

Respectfully submitted.

/s/ WILLIAM D. ROGERS

WILLIAM D. ROGERS
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
202-872-6700
Counsel for Petitioners

February 19, 1991

A-148

No. A-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

M. L. GOLDBERG INC. FINE ARTS

and PEG GOLDBERG,

Petitioners,

v.

ALTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and THE REPUBLIC OF CYPRUS,

Respondents.

CERTIFICATE OF SERVICE

I, William D. Rogers, a member of the Bar of this Court, hereby certify that on this 19th day of February 1991, one copy of the Application for Extension of Time to File Petition for Writ of Certiorari in the above-titled case was delivered by hand to Thomas R. Kline, Esq., 1701 Pennsylvania Ave., N.W., Suite 200, Washington, D.C. 20006 and one copy was mailed, first class postage prepaid, to John David Hoover, Esq., 1800 INB Tower, One Indiana Square, Indianapolis, IN 46204, counsel for all the respondents herein. I further certify that all parties required to be served have been served.

/s/ WILLIAM D. ROGERS

WILLIAM D. ROGERS
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
202-872-6700
Counsel for Petitioners

THOMAS R. KLINE
(Counsel of Record)
THOMAS E. STARNES
ANDREWS & KURTH L.L.P.
1701 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 662-2700

JOHN DAVID HOOVER
SALLY F. ZWEIG
JOHNSON, SMITH, DENSBORN,
WRIGHT & HEATH
One Indiana Square, Suite 1800
Indianapolis, Indiana 46204
(317) 634-9777

Attorneys for Respondents